Fall 2017

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Johnson, Olatunde C. A.	4.0	A
L6105-1	Contracts	Kraus, Jody	4.0	B
L6113-2	Legal Methods	Harcourt, Bernard E.	3.0	CR
L6115-7	Legal Practice Workshop I	Heller, Deborah; Kosman, Joel	2.0	P
L6118-1	Torts	Liebman, Benjamin L.	4.0	A-

Total Registered Points: 17.0

Total Earned Points: 17.0

Total Registered JD Program Points: 86.0

Total Earned JD Program Points: 86.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2019-20	Harlan Fiske Stone	3L
2019-20	Parker School Recognition of Achievement	3L
2018-19	James Kent Scholar	2L
2017-18	Simon H.Rifkind Prize	1L
2017-18	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	8.0

Washington University Unofficial Transcript for: **William (Will) Palmer Wilder**
Student ID Number: 419307
Student Record data as of: 6/10/2021 10:54:15 AM

HOLDS - no records of this type found

DEGREES AWARDED

MINOR IN GENERAL ECONOMICS	May 15, 2015
A.B. MAJOR IN POLITICAL SCIENCE	May 15, 2015
MINOR IN ENVIRONMENTAL STUDIES	May 15, 2015

MAJOR PROGRAMS

---------Semester---------				Prime	
Admitted	**Terminated**	**Status**	**Code**	**or Joint**	**Program**
SP2014	SP2015	Completed	LA82M1	Joint	MINOR IN ENVIRONMENTAL STUDIES
FL2012	SP2015	Completed	LA3201	Prime	A.B. MAJOR IN POLITICAL SCIENCE
SP2014	SP2015	Completed	LA11M1	Joint	MINOR IN GENERAL ECONOMICS
FL2011	FL2012	Closed	LA0001	Prime	A.B. UNDECLARED MAJOR

ADVISORS

Advisor	Advisor Type	Start Dt	End Dt	Program	Email
Dorothy A. Petersen	Faculty Advisor	4/23/2014	5/14/2015	LA11M1 MINOR IN GENERAL ECONOMICS	DOTTIE@WUSTL.EDU
Tiffany Knight	Faculty Advisor	4/7/2014	5/14/2015	LA82M1 MINOR IN ENVIRONMENTAL STUDIES	tknight@biology2.wustl.edu
Guillermo Rosas	Faculty Advisor	3/21/2013	5/14/2015	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	grosas@WUSTL.EDU
Ingrid Dargin Anderson	Faculty Advisor	1/11/2013	3/21/2013	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	idanders@WUSTL.EDU
Ian MacMullen	Faculty Advisor	11/19/2012	1/11/2013	LA3201 A.B. MAJOR IN POLITICAL SCIENCE	imacmull@artsci.wustl.edu
Brian Woll	Unknown	12/20/2011	11/1/2012		BWoll9876@WUSTL.EDU
Sharon M Stahl	A&S Four Year Advisor	8/9/2011	5/14/2015		SSTAHL@WUSTL.EDU
Kristin H Kerth	A&S Four Year Advisor	7/14/2011	8/9/2011		kkerth@artsci.wustl.edu

SEMESTER COURSEWORK AND ACADEMIC ACTION

Note: Courses dropped with a status of 'D' will not appear on your transcript.
Courses dropped with a status of 'W' will appear on your transcript.

FL2011

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L11 Econ	1021	02	3.0	C		B+				Introduction to Macroeconomics
L24 Math	132	01	3.0	C	D	B				Calculus II
L24 Math	132	Q	0.0							Calculus II
L27 Music	1754	28	3.0	C		A				JAZZ GUITAR
L32 Pol Sci	2010	01	3.0	C	A	A				Introduction to Environmental Policy
L43 GeSt	210	01	1.0	P		CR#				Honorary Scholars Program Seminar
L90 AFAS	162	01	3.0	C		B+				Freshman Seminar: Contextualizing Problems in Contemporary Africa

Enrolled Units: 16.0 **Semester GPA:** 3.52 **Cumulative Units:** 28.0 **Cumulative GPA:** 3.52

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

SP2012

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L11 Econ	493	02	1.0	C		B+				Mathematical Economics
L13 E Comp	100	23	3.0	C	B+	A-				Writing 1
L14 E Lit	155	01	3.0	C		A-				Literature Seminar for Freshmen: From Frankenstein to Dracula
L28 P.E.	220	01	1.0	P		CR#				Varsity Sports
L32 Pol Sci	103B	01	3.0	C		A				International Politics
L43 GeSt	210	01	1.0	P		CR#				Honorary Scholars Program Seminar
L82 EnSt	201	01	4.0	C	A-	A-				Earth and the Environment
L82 EnSt	201	A	0.0							Earth and the Environment

Enrolled Units: 16.0 **Semester GPA:** 3.74 **Cumulative Units:** 44.0 **Cumulative GPA:** 3.62

MSN 8102 SPRING WRITING PLACEMENT, Approved to enroll in Writing 1 **Transcript:** No **Expires** 12/31/2999

MSN 8110 WRITING 1 REQUIREMENT STATUS, Satisfied **Transcript:** No **Expires** 12/31/2999

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

FL2012

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L11 Econ	4011	02	3.0	C		B-				Intermediate Microeconomic Theory
L32 Pol Sci	3422	01	3.0	C		B+				Americans and Their Presidents
L32 Pol Sci	3422	C	0.0							Americans and Their Presidents
L32 Pol Sci	363	01	3.0	C		B				Quantitative Political Methodology
L32 Pol Sci	363	C	0.0							Quantitative Political Methodology
L41 Biol	2950	01	3.0	C	A-	A-				Introduction to Environmental Biology
L48 Anthro	3283	01	3.0	C		A				Introduction to Public Health
L98 AMCS	120	01	3.0	C		A-				Social Problems and Social Issues

Enrolled Units: 18.0 **Semester GPA:** 3.40 **Cumulative Units:** 62.0 **Cumulative GPA:** 3.54

SP2013

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L27 Music	3023	01	3.0	C		A				Jazz in American Culture
L28 P.E.	220	01	1.0	P		CR#				Varsity Sports
L32 Pol Sci	336	01	3.0	C		B+				Topics in Politics: American Elections and Voting Behavior
L32 Pol Sci	3561	01	3.0	C		A				Topics in Politics: Game Theory and Political Science
L32 Pol Sci	3561	D	0.0							Topics in Politics: Game Theory and Political Science
L48 Anthro	160B	02	3.0	C		A				Introduction to Cultural Anthropology
L48 Anthro	397	01	1.0	C		A				Proseminar: Issues and Research in Anthropology
L48 Anthro	4322	01	3.0	C		A				Brave New Crops

Enrolled Units: 17.0 **Semester GPA:** 3.87 **Cumulative Units:** 79.0 **Cumulative GPA:** 3.62

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

FL2013

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L27 Music	1091	01	3.0	P		CR				Jazz Theory I
L27 Music	1091	K	0.0							Jazz Theory I
L32 Pol Sci	326B	01	3.0	C		B+				Latin-American Politics
L32 Pol Sci	3280	01	3.0	C		A				Political Intolerance in World Politics
L48 Anthro	3472	01	3.0	C		A				Global Energy and the American Dream
L48 Anthro	361	01	3.0	C		A				Culture and Environment

Enrolled Units: 15.0 **Semester GPA:** 3.83 **Cumulative Units:** 94.0 **Cumulative GPA:** 3.65

SP2014

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L27 Music	3091	01	3.0	C		A-				JAZZ IMPROVISATION I
L28 P.E.	220	01	1.0	P		CR#				Varsity Sports
L32 Pol Sci	3011	01	3.0	C		A				Computational Modeling in the Social Sciences
L32 Pol Sci	3441	01	3.0	C		B+				Defendant's Rights
L32 Pol Sci	4260	01	3.0	C		A				Writing about Civil Rights
L48 Anthro	260	01	1.0	C		A				Topics in Health and Community
U08 Educ	4210	01	3.0	C		A				Creating Video Documentaries

Enrolled Units: 17.0 **Semester GPA:** 3.81 **Cumulative Units:** 111.0 **Cumulative GPA:** 3.68

HON 0001 DEAN'S LIST **Transcript:** Yes **Expires** 12/31/2999

FL2014

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**
L11 Econ	460	01	3.0	C		A				Urban Economics
L27 Music	1024	01	3.0	P		CR				Mozart: The Humor, Science, and Politics of Music
L82 EnSt	335F	02	3.0	C		A				Introduction to Environmental Ethics
L82 EnSt	539	01	3.0	C		A				Interdisciplinary Environmental Clinic

Enrolled Units: 12.0 **Semester GPA:** 4.00 **Cumulative Units:** 123.0 **Cumulative GPA:** 3.71

SP2015

				-----Grade-----						
Department	**Course**	**Sec**	**Units**	**Opt**	**Mid**	**Final**	**Dean**	**Dropped**	**WaitListed**	**Title**

L11 Econ	348	01	3.0	C	A-	Economic Realities of the American Dream
L11 Econ	4021	01	3.0	C	A	Intermediate Macroeconomic Theory
L19 EPSc	323	01	3.0	C	B+	Biogeochemistry
L28 P.E.	221	01	1.0	P	CR#	Varsity Sports
U24 Mus	218	01	3.0	C	A	The Music of the Beatles

Enrolled Units: 13.0 **Semester GPA:** 3.75 **Cumulative Units:** 136.0 **Cumulative GPA:** 3.72

HON 0039 COLLEGE HONORS IN A&S **Transcript:** Yes **Expires** 12/31/2999

HON 0418 W. ALFRED HAYES AWARD **Transcript:** Yes **Expires** 12/31/2999

OTHER CREDITS

Semester	Dept	Course	SIS Title	Type	Units	---------Units--------- AP	Design	Topics	Dean Req. Art Code Met	Sci	Comments
FL2011	L22	163	Freedom, Citizenship, & the Making of American Culture from the Colonial era to the Present		0.00	3.00					Advanced Placement
School:			**Other Title:**						**Original Grade:**		
FL2011	L24	131	Calculus I		0.00	3.00					Advanced Placement
School:			**Other Title:**						**Original Grade:**		
FL2011	L32	101B	American Politics		0.00	3.00					Advanced Placement
School:			**Other Title:**						**Original Grade:**		
FL2011	L43	9999	Total Credit Granted By Prematriculation Units		12.00						
School:			**Other Title:**						**Original Grade:**		
FL2011	L82	0001	Environmental Studies Elective		0.00	3.00					Advanced Placement
School:			**Other Title:**						**Original Grade:**		

GPA SUMMARY

	Semester Units						Cumulative Units					Level	GPA		
Semester	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Grade Pts.	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Units	Sem.	Cum.	Level
FL2011	15.0	15.0	1.0	1.0	12.0	52.8	15.0	15.0	1.0	1.0	12.0	28.0	3.52	3.52	2
SP2012	14.0	14.0	2.0	2.0	0.0	105.1	29.0	29.0	3.0	3.0	12.0	44.0	3.74	3.62	3
FL2012	18.0	18.0	0.0	0.0	0.0	166.3	47.0	47.0	3.0	3.0	12.0	62.0	3.40	3.54	5
SP2013	16.0	16.0	1.0	1.0	0.0	228.2	63.0	63.0	4.0	4.0	12.0	79.0	3.87	3.62	6
FL2013	12.0	12.0	3.0	3.0	0.0	274.1	75.0	75.0	7.0	7.0	12.0	94.0	3.83	3.65	7
SP2014	16.0	16.0	1.0	1.0	0.0	335.1	91.0	91.0	8.0	8.0	12.0	111.0	3.81	3.68	8
FL2014	9.0	9.0	3.0	3.0	0.0	371.1	100.0	100.0	11.0	11.0	12.0	123.0	4.00	3.71	8
SP2015	12.0	12.0	1.0	1.0	0.0	416.1	112.0	112.0	12.0	12.0	12.0	136.0	3.75	3.72	8

ENROLLMENT STATUS

Semester	Start	End	Enrollment Status	Level	Units	Status Change Date
FL2011	8/30/2011	12/21/2011	Full-Time Student	1	16.0	
SP2012	1/17/2012	5/18/2012	Full-Time Student	3	16.0	
FL2012	8/28/2012	12/19/2012	Full-Time Student	3	18.0	
SP2013	1/14/2013	5/17/2013	Full-Time Student	6	17.0	
FL2013	8/27/2013	12/18/2013	Full-Time Student	6	15.0	
SP2014	1/13/2014	5/16/2014	Full-Time Student	8	17.0	
FL2014	8/25/2014	12/17/2014	Full-Time Student	8	12.0	
SP2015	1/12/2015	5/6/2015	Full-Time Student	8	13.0	

DEMOGRAPHICS

Birthdate: 2/24/1993
Birth Place: Birmingham AL
Date of Death:
Gender: M
Marital Status:
Veteran Code:
Locale: 0
U.S. Citizen: Y

Race: 6 - White (Non-Hispanic Origin)
Hispanic: N
American Indian: N
Asian: N
Black: N
Hawaiian Pacific: N

Semester of Entry: FL2011
Entry Status: F
Anticipated Deg Dt: 2015
Std Expt Graduation:
Frozen Cohort: FR2015LA
Faculty/Staff Child:
Alumni Code:
Prof. School1: PL

Country: USA
Visa Type:
Nonresident Alien: N

White: Y
Not Reported: N

Prof. School2:
Area of Interest:
Area of Interest Code: 3222PL

ADMINISTRATIVE CODES

Type	Value
Personal Email Address	wwilder84@gmail.com

HIGH SCHOOL

Name	Code	GPA	Weight	Class Size	Class Rank
Mountain Brook High School	010380	96.50			

PREVIOUS SCHOOLS - no records of this type found

UNIVERSITY EMAIL ADDRESS: wilderwill@wustl.edu **FORWARDS TO:** wwilder84@gmail.com

Fatal Asymmetry: Facebook, Criminal Law, and the Constitutional Catch-22 in the Stored Communications Act of 1986

On a San Francisco summer night in June 2013, Jaquan Rice, Jr. was murdered in a tragic drive-by shooting.[1] The shooter, a minor at the time, pled guilty and is currently serving an extended sentence.[2] Prosecutors allege that two other men, Derrick Hunter and Lee Sullivan, were also involved in the killing.[3] The case against Hunter and Sullivan is less straightforward, and has wound its way through the California court system for years.[4] What at first appeared to be a typical murder prosecution now has the potential to complicate years of precedent in jurisdictions across the country. The heightened stakes are due not to the facts of the case, but to the third-party involvement of a global superpower: Facebook.

Hunter and Sullivan allege that the surviving victim in the shooting, Renesha Lee, implicated the two of them because of personal and gang-related grievances.[5] Lee and Rice were members of a rival gang, and Lee had previously dated Sullivan.[6] Lee is the only witness who placed Sullivan at the scene of the crime. Sullivan and Hunter allege that Lee's private conversations on Facebook and Instagram with other members of the gang would exonerate the two of them, or at the very least reduce their level of culpability.[7] They attempted to subpoena Facebook, triggering protracted litigation between Facebook, the Defendants, and the Superior Court of San Francisco over the enforceability of the subpoena.

The facts of the Hunter and Sullivan case ("The Hunter Litigation") are not unique. Facebook, Instagram, and other tech companies routinely turn over private information to prosecutors subject to

[1] Maura Dolan, *In Unprecedented Move, Facebook, Instagram, Twitter Ordered to Provide Private Posts in Gang Trial*, L.A. TIMES (July 18, 2019), https://www.latimes.com/california/story/2019-07-18/private-facebook-postings-gang-trial-california-supreme-court.
[2] *Id.*
[3] Hanna Kozlowska, *Facebook Content is Convenient for Prosecutors, but not for Defendants*, QUARTZ (June 8, 2018), https://qz.com/1294164/facebook-content-is-convenient-evidence-for-prosecutors-but-still-not-for-defendants/.
[4] *See e.g.* Facebook, Inc. v. Superior Court, 240 Cal. App. 4th 203 (Cali. 2015) (reversing trial court order for pretrial production of private materials otherwise protected by the Stored Communications Act); Facebook, Inc. v. Superior Court, 15 Cal. App. 5th 729 (Cali. 2017) (finding that the Supremacy Clause requires California discovery rules to be interpreted in a way to not violate the Stored Communications Act); Facebook, Inc. v. Superior Court, No. S256686, 2019 LEXIS 5230 (Cali. July 17, 2019) (upholding a trial court finding of a "strong justification" for an equitable exception to the Stored Communications Act).
[5] Kozlowska, *supra* note 3.
[6] *Id.*
[7] Lee and Rice's *public* Facebook and Instagram posts were also a major issue earlier in the litigation. Rice had publicly threatened Hunter, Sullivan, and the convicted minor multiple times in the weeks before the shooting, and the minor victim initially claimed he was acting in self-defense before accepting a plea deal.

search warrants or lawful subpoenas.[8] However, virtually every state and federal court in the country has held that Facebook cannot turn over this type of information to criminal defense attorneys.[9] This creates an inherent information asymmetry for criminal defendants: the prosecution has access to potentially exculpatory private messages that the defense attorney may never see.[10]

This asymmetry emerges from court interpretation of the Stored Communications Act of 1986 ("SCA").[11] The SCA requires tech companies such as Facebook to refuse to voluntarily hand over private information stored on their servers.[12] It contains an exception for government actors such as prosecutors acting pursuant to a lawful subpoena or search warrant.[13] State and federal courts had consistently found this exception to not extend to criminal defendants.[14]

In the Hunter Litigation, the California Supreme Court upheld an intermediate court decision applying a good cause balancing test to determine whether to grant the defendants' subpoena of Facebook.[15] This case reveals a number of constitutional tensions inherent in SCA interpretation, and threatens to upend the operability of the SCA's subpoena system.

This paper will analyze the tensions beginning to emerge in SCA subpoena doctrine from the Hunter Litigation and will attempt to outline solutions for resolving tensions between privacy and due process inherent in interpretation and application of the SCA. Part I will discuss the legislative history and

[8] *See* FACEBOOK, TRANSPARENCY REPORT: UNITED STATES (2019), https://transparency.facebook.com/government-data-requests/country/US (disclosing the 50,741 data requests Facebook granted to U.S. government actors in the first six months of 2019).
[9] *See e.g.* United States v. Wenk, 319 F. Supp. 3d 828 (E.D.V.A. 2017) (granting Google's motion to quash a subpoena from a criminal defendant for private emails); State v. Johnson, 538 S.W.3d 32 (Tenn. 2016) (finding that the Stored Communications Act barred criminal defendants from obtaining any private information from service providers); State v. Bray, 363 Ore. 226 (Ore. 2018) (finding that an information asymmetry under the Stored Communications Act did not constitute a *Brady* violation). For a deeper discussion of these cases, *see infra* Part I.B.
[10] *See* Jeffrey D. Stein, *Why Evidence Exonerating the Wrongly Accused can Stay Locked Up on Instagram*, WASH. POST (Sep. 10, 2019), https://www.washingtonpost.com/opinions/2019/09/10/why-evidence-exonerating-wrongly-accused-can-stay-locked-up-instagram/.
[11] 18 U.S.C. § 2701 (2018).
[12] 18 U.S.C. § 2702(a) (2018).
[13] 18 U.S.C. § 2702(b)(7)-(9) (2018).
[14] *See e.g.* Facebook v. Wint, 199 A.3d 625 (D.C. 2019) (holding that the SCA did not require Facebook to turn over private messages to a criminal defendant in a murder and arson case); State v. Johnson, 538 S.W.3d 32 (TN Dec. 20, 2016) (holding that the SCA exception only applied to "Fourth Amendment actors" such as prosecutors and police); United States v. Amawi, 552 F. Supp. 2d 679 (N.D. Oh. May 19, 2018) (holding that the Federal Public Defender's Office was not a "government actor" entitled to subpoena Facebook under the SCA).
[15] Facebook, Inc. v. Superior Court, 2019 Cal. LEXIS 6832 (Cali. Sep. 11, 2019).

initial constitutional interpretation of the SCA, and will then explain how courts interpreting the SCA created an information asymmetry between prosecutors and criminal defendants. Part II will explain how the Hunter Litigation reveals the unresolved tension between privacy and due process. Part II will then discuss how the Hunter Litigation could upend SCA interpretation and seriously disrupt tech company subpoena policies. Finally, Part III will propose that Congress cure the information asymmetry by amending the SCA to create a uniform exception for prosecutors and criminal defense attorneys.

I. The Stored Communications Act of 1986 and its Interpretations in State and Federal Court

The Hunter Litigation hinges on the interpretation and application of the Stored Communications Act of 1986.[16] This Part will begin with a discussion of the history, operability, and general constitutionality of the SCA. This Part will then explain the prosecution-defense information asymmetry that court interpretation of the SCA creates, and discuss recent litigation challenging it. Finally, this Part will analyze Facebook's internal policy for complying with the SCA in responding to requests for information.

A. The Background and Constitutionality of the SCA

The Stored Communications Act of 1986 governs all disclosures of electronic communications stored with technology providers.[17] Section 2702 of the SCA prohibits any "person or entity providing an electronic communication service to the public" from knowingly divulging "the contents of a communication while in electronic storage" to any third party.[18] The statute authorizes civil damages actions against companies such as Facebook that voluntarily turn over private communications.[19]

The SCA is at its core a privacy statute.[20] However, because of its exemptions for law enforcement, it also interacts with criminal procedure, due process, and Fourth Amendment law in complex ways. Section 2702(b)(7) allows disclosure to law enforcement of private communications if the

[16] 18 U.S.C. § 2701 et seq (2018).
[17] *Id.*; Michael E. Lackey & Oral D. Pottinger, *Stored Communications Act: Practical Considerations*, LEXIS PRACTICE ADVISOR JOURNAL (June 22, 2018), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/stored-communications-act-practical-considerations.
[18] 18 U.S.C. § 2702(a) (2018).
[19] 18 U.S.C. § 2707(c) (2018).
[20] Lackey & Pottinger, *supra* note 17.

communications "appear to pertain to the commission of a crime."[21] This exception covers prosecutors.[22] Moreover, under 2702(b)(8), any "governmental entity" is exempt and allowed to subpoena communications when responding to an "emergency involving danger or death or serious physical injury to any person."[23]

The highest-profile criminal procedure and defendants' rights cases emerging from the SCA to date have revolved around situations where law enforcement SCA subpoenas have triggered Fourth Amendment concerns. In *Carpenter v. United States*, the Supreme Court found that the evidentiary showing of need required for law enforcement to access communications protected under the SCA fell short of the Fourth Amendment's probable cause standard.[24] This meant that even where law enforcement lawfully accessed communications by filing an SCA request with a tech company, the communications could still be excluded in court because of other Fourth Amendment doctrines.[25] A number of circuits have gone as far as to find the SCA unconstitutional as applied to government requests to obtain emails unless the government also receives a valid search warrant from a judge.[26] Cases such as *Carpenter* and the complex Fourth Amendment third-party doctrine questions they pose have been the subject of extensive academic commentary.[27]

B. Litigation Challenging the SCA Information Asymmetry

An equally complex question about the SCA arises from the other side of a criminal trial: what happens when a criminal defendant seeks to take advantage of the SCA's government exception and access private communications stored by a third party? This is the precise situation at play in the Hunter

[21] 18 U.S.C. § 2702(b)(7)(A)(ii) (2018).
[22] *See e.g. Wint*, 199 A.3d at 628 (finding the U.S. Attorney for D.C. to be covered by the § 2702(b)(7)(A)(ii) "law enforcement" exception); Johnson, 538 S.W.3d at 34 (finding state prosecutors in Tennessee to fall under the same exception).
[23] 18 U.S.C. § 2702(b)(8) (2018).
[24] Carpenter v. United States, 138 S. Ct. 2206 (2018).
[25] *Id.*
[26] United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).
[27] *See e.g.* Marisa Kay, *Reviving the Fourth Amendment: Reasonable Expectations of Privacy in a Cell Phone Age*, 50 J. MARSHALL L. REV. 555 (Spring 2017) (analyzing an individual's reasonable expectation of privacy under the SCA's third-party doctrine); Brian Tuinenga, *Log In to the Danger Zone: Data Privacy under the SCA and Microsoft*, 51 VAL. U.L. REV. 291 (Fall 2016) (analyzing Fourth Amendment concerns related to subpoenas of Microsoft during the Silk Road prosecutions); Robert A. Pikowsky, *The Need for Revisions to the Law of Wiretapping and Interception of Email*, 10 MICH. TELECOMM. TECH. L. REV. 1 (Fall 2003) (arguing amendments to the SCA are needed to preserve privacy rights).

Litigation.[28] Every court to previously consider this question has found that the SCA does not allow tech companies to hand private communications over to criminal defendants.[29] For criminal defendants, this interpretation creates a fatal information asymmetry.

Cases challenging the SCA asymmetry between prosecution and defense access to private information typically emerge from one of two procedural postures.[30] In some cases, the court refuses to issue a subpoena to a tech company such as Facebook at all, and the defendant essentially litigates their claim against the prosecutor in pretrial motion practice.[31] In other cases, the court issues the subpoena, and the tech company litigates against either the defendant or the court itself to quash the subpoena.[32] Courts apply the same law and reasoning in both procedural postures.[33]

Before the Hunter Litigation, defense attorneys typically challenged the SCA bar on subpoenas to tech companies for private information in one of two ways: by claiming that the statute should be interpreted according to the rule of lenity to find an implied exception for criminal defendants,[34] or by arguing the SCA is unconstitutional under the 5th and 14th Amendments as applied to their case.[35]

Courts across the country have squarely addressed and rejected the statutory interpretation line of attack to subpoena refusals under the SCA. The most notable of these challenges was *Facebook v. Wint*.

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[28] Facebook, Inc. v. Superior Court of San Francisco, No. A157143, 2020 Cal. App. Unpub. LEXIS 1039 (Cali. Feb. 13, 2020).
[29] *See. e.g.* Facebook v. Wint, 199 A.3d 625 (D.C. 2019); State v. Johnson, 538 S.W.3d 32 (TN Dec. 20, 2016); United States v. Amawi, 552 F. Supp. 2d 679 (N.D. Oh. May 19, 2018).
[30] *Compare* United States v. Pierce, 785 F.3d 832 (2d Cir. 2015) (affirming a decision of the Southern District of New York to not allow a criminal defendant to subpoena Facebook because of the SCA) to *Wint*, 199 A.3d at 630 (reversing a trial court decision, quashing a subpoena of Facebook for privately held messages, and finding that the SCA permits only voluntary disclosure to any party other than law enforcement).
[31] *See e.g. Pierce*, 785 F.3d at 835; State v. Bray, 363 Ore. 226 (OR. July 5, 2018) (affirming a trial court decision to not subpoena Google because of the SCA).
[32] *See e.g. Wint*, 199 A.3d at 630 (reversing a trial court decision, quashing a subpoena of Facebook for privately held messages, and finding that the SCA permits only voluntary disclosure to any party other than law enforcement).
[33] *Compare Pierce*, 785 F.3d at 840, to *Wint*, 199 A.3d at 635 (both holding that the SCA does not allow tech companies to turn over private communications to criminal defendants because criminal defense attorneys are not government actors in law enforcement capacities).
[34] *Wint*, 199 A. 3d at 634.
[35] State v. Johnson, 538 S.W.3d 32 (TN Dec. 20, 2016). Defense attorneys working in government-funded public defender offices have also claimed they should be covered under the 2702(b)(8) "government entity in an emergency" exceptions. They have argued that as part of the judicial branch of the government, they are a "government entity," and that a potential wrongful conviction constitutes an "emergency involving danger." This argument has been unsuccessful. *See* United States v. Amawi, 552 F. Supp. 2d 679 (N.D. Oh. May 19, 2018) (holding that the Federal Public Defender's Office was not a "government entity" entitled to subpoena Facebook under the SCA); State v. Johnson, 538 S.W.3d 32 (TN Dec. 20, 2016) (holding that the 2702(b)(7) and 2702(b)(8) exceptions apply only to government actors that are bound by the Fourth Amendment, which does not include public defenders).

A criminal defendant attempted to subpoena Facebook, arguing that the SCA should not apply to court subpoenas because responding to a subpoena is not a "voluntary" disclosure under Section 2702 of the SCA.[36] The argument failed for several reasons. First, while "voluntary" appears in the section title of the statute and appears consistently throughout the Congressional record and legislative history, the statute itself instead uses the word "knowingly."[37] The court refused to look to outside factors when the plain meaning of the text provided an answer.[38] The defendant also argued that because the SCA's legislative history did not include any discussion of subpoenas by criminal defense attorneys, the statute should not be interpreted to reach that area of law, given the heightened liberty interests at play. The court again did not find this argument persuasive when contrasted with the plain language of the statute itself.[39]

Defendants attempting to strike down the SCA as unconstitutional on due process grounds as applied to their case have faced a different problem: getting the court to find a cognizable constitutional harm. Courts have consistently found that because there are other methods available to criminal defendants to access private messages held by tech companies, the SCA creates no constitutional harm.[40] The Tennessee Supreme Court found in *State v. Johnson* that regular civil discovery via a subpoena directly to the victim would be sufficient to get necessary data from Facebook.[41] The Second Circuit found no constitutional harm because private investigators were eventually able to uncover most of the content through investigation and speaking with third parties who had interacted with the relevant witnesses online.[42]

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[36] *Wint*, 199 A.3d at 634. *See also* Meghan Natenson & Jessica S. Heim, *Court Backs Facebook's Refusal to Comply with Criminal Defendant's Subpoena*, V&E REPORT (Jan. 11, 2019), https://www.velaw.com/insights/court-backs-facebooks-refusal-to-comply-with-criminal-defendants-subpoena/ (analyzing the opinion's potentially broad-reaching impacts on white collar defendants); Stein, *supra* note 10 (discussing the case's potential impact on low-income criminal defendants wrongfully accused of crimes); Doug Austin, *Relying on Interpretation of the SCA, Appeals Court Reverses Subpoenas Against Facebook: eDiscovery Case Law*, JD SUPRA (Feb. 7, 2019), https://www.jdsupra.com/legalnews/relying-on-interpretation-of-the-sca-33090/ (naming *Wint* as a D.C. case students should read and understand).
[37] *Wint*, 199 A.3d at 629.
[38] *Id.*
[39] *Id.* at 631.
[40] *Johnson*, 538 S.W.3d at 36; United States v. Pierce, 785 F.3d 832 (2d Cir. May 11, 2015). As will be discussed further *infra*, these "alternative methods" have proven to be merely hypothetical in most cases.
[41] *Johnson*, 538 S.W.3d at 36. The Eastern District of Virginia reached the same conclusion, *see* United States v. Wenk, 319 F. Supp. 3d 828 (E.D.V.A. Nov. 29, 2017).
[42] *Pierce*, 785 F.3d at 840.

Some defense attorneys have attempted to identify a cognizable constitutional harm by framing their due process claim as a *Brady* violation,[43] alleging that the state had a duty to subpoena and then turn over any potentially exonerating private information.[44] The Oregon Supreme Court rejected this claim in *State v. Bray*¸ finding that the state did not in fact "control" any privately held information, and that no *Brady* claim arose when the state never subpoenaed the information in the first place.[45]

Defense attorneys argue that court findings of no constitutional harm miss the point.[46] Deleting a message from a platform such as Facebook Messenger is simple. A subpoena to an individual would only require that individual to turn over the messages still visible in their account, which would not include deleted messages. A subpoena directly to Facebook would be more powerful, as Facebook retains metadata on deleted conversations.[47] There is thus still an information asymmetry between prosecution and defense, even when the defense is able to subpoena data directly from individuals. The private investigator rationale proffered by the Second Circuit does not solve this asymmetry, as a private investigator also would not have access to metadata for deleted messages.[48] Further, if the messages were sent via a fake account, the defense might not be able to determine who to actually subpoena.

C. Facebook's SCA Compliance Policy

[43] The government's withholding of material evidence violates a defendant's constitutional due process rights and can constitute a reversible error upon appeal. Prosecutors are under a duty to remedy any violation by turning over exculpatory information revealed during their preparation for a case. Brady v. Maryland, 372 U.S. 83 (1963).
[44] State v. Bray, 363 Ore. 226 (OR. July 5, 2018).
[45] *Id.* The defendant alleged that internet search history information on the victim's Google account would prove he acted in self-defense, and that the state was intentionally not exercising its subpoena power under the SCA in order to avoid the search data coming to light in court. *Id.*
[46] *See* Kozlowska, *supra* note 3.
[47] *Id.* For example, Facebook's current data storage policy retains deleted Messenger messages for 90 days, but any message "can be accessed and preserved for an extended period when it is the subject of a legal request or obligation, governmental investigation, or investigations of possible violations of our terms or policies, or otherwise to prevent harm." *Data Policy*, FACEBOOK (2021), https://www.facebook.com/about/privacy/.
[48] The Second Circuit's logic was that private investigators would be able to get the same information by interviewing third parties. Pierce, 785 F.3d at 840. This logic, however, overstates the power and reach of private investigators. A private investigator retained by a criminal defense attorney has no power to compel witnesses to participate in interviews. *See* Marc Davis, *Some Firms Swear by the Use of Private Investigators*, ABAJOURNAL (Mar. 1, 2016), https://www.abajournal.com/magazine/article/some_firms_swear_by_the_use_of_private_investigators. If a witness deletes potentially exculpatory digital messages, there is no reason they would voluntarily sit for an interview with a defendant's investigator.

Facebook has developed a comprehensive policy in response to this interpretation of the SCA.[49] When they receive a subpoena request from a law enforcement agency, they determine whether it is "lawful" and then typically grant the request without litigation if it meets their standards. In the first half of 2019, Facebook received 50,741 such requests nationwide, and produced at least some data in response 88% of the requests.[50] 47,457 of these requests came through what Facebook considers the "standard legal process," which includes Section 2702(b)(7) "law enforcement" requests under the SCA as well as requests under national security statutes such as Foreign Intelligence Surveillance Act and the Wiretap Act.[51]

The remaining 3,284 requests were "emergency requests," which would include Section 2702(b)(8) requests under the SCA.[52] Facebook also has a blanket policy of not responding to subpoenas from private parties, including criminal defendants.[53] As discussed above, this policy is likely the only sound business decision given current interpretation of the SCA nationwide. Any attempt to deal with subpoenas from criminal defense attorneys on a case-by-case basis would expose Facebook to civil damages liability under the SCA.[54]

II. The Competing Tensions of Privacy, Due Process, and the SCA in the Hunter Litigation

The ongoing Hunter Litigation provides a window into longstanding tensions between due process and privacy inherent in interpretation of the SCA. The case also threatens to upend current SCA interpretation doctrine in a manner that could have significant effects for both criminal defendants and

[49] *Safety Center: Information for Law Enforcement Authorities*, Facebook (2020), https://www.facebook.com/safety/groups/law/guidelines/ ("We disclose account records solely in accordance with our terms of service and applicable law, including the federal Stored Communications Act.").
[50] TRANSPARENCY REPORT, *supra* note 5. At first glance, 50,741 requests from prosecutors may seem low, given that there were over 1,000,000 violent crimes in the United States in 2019. FBI, CRIME IN THE U.S.: PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT, JANUARY-JUNE 2019 (Sept. 2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/preliminary-report. However, when contemplating that less than 2% of criminal cases go to trial and that discovery during pretrial plea bargaining is often limited, this number is less surprising. *See* INNOCENCE PROJECT, REPORT: GUILTY PLEAS ON THE RISE, CRIMINAL TRIALS ON THE DECLINE (Aug. 7, 2018), https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/.
[51] *Id.*
[52] *Id.*
[53] *Help Center: Law Enforcement & Third-Party Matters*, FACEBOOK (2020), https://www.facebook.com/help/473784375984502 ("Federal law does not allow private parties to obtain the content of communications . . . using subpoenas. See the Stored Communications Act, 17 U.S.C. § 2701 et seq.").
[54] The SCA provides that a court may "assess as damages in a civil action […] the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c) (2018).

tech companies. This Part will provide background on the Hunter Litigation, analyze the potential wide-reaching effects of the Hunter Litigation's "Good Cause" balancing test on criminal defendants and defense attorneys, and discuss the broader tensions between privacy and due process inherent in any interpretation of the SCA.

A. Background on the Hunter Litigation

The Hunter Litigation defendants allege that, under the doctrine of constitutional avoidance, the SCA must be construed to be constitutional if possible, and that in order for the SCA to be constitutional, it must contain an implied due process exception for criminal defendants.[55] The first time the motion was appealed, the California Supreme Court declined to reach the question of whether the SCA must be read to contain such an implied exception, and instead merely ordered that Facebook turn over evidence of all public posts relevant to the case that had since been deleted[56] and allowed the pretrial motion litigation to continue.

The public posts did not ultimately resolve the factual questions, and defendants tried again. This time, the presiding trial judge granted defendants' motion and issued subpoenas against Facebook, Instagram, and Twitter, finding an implied "good cause" exception to the SCA arising from constitutional due process.[57] Outside groups were obviously well aware of the stakes of this litigation, as groups such as Google,[58] the California Public Defenders Association,[59] and California Attorneys for Criminal Justice[60] weighed in as amici.

The California Supreme Court ordered the parties to brief about "whether the underlying subpoena is supported by good cause."[61] In determining whether "good cause" created an as-applied

[55] Dolan, *supra* note 1.
[56] Defendants already had screenshots of the public posts, but needed to subpoena Facebook for metadata to confirm the screenshots were real in order to admit them as evidence. *See Id.* This ruling was not unique – most state courts interpret the "lawful consent" exception to the SCA apply to any online posts initially configured as public. Facebook, Inc. v. Superior Court (Hunter), 4 Cal. 5th 1245 (Cali. May 24, 2018).
[57] *Id.*
[58] Facebook Inc. v. Superior Court, 2017 Cal. LEXIS 2376, No. S230051 (Cali. Mar. 24, 2017).
[59] Facebook Inc. v. Superior Court, 2018 Cal. LEXIS 3545, No. S245203 (Cali. May 17, 2018).
[60] Id.
[61] Facebook, Inc. v. Superior Court, 2019 Cal. LEXIS 6116, No. S245203 (Cali. Aug. 14, 2019).

constitutional exception, they ordered the parties to weigh whether the defendant made "adequate efforts" to access the private messages through other methods such as a direct subpoena, whether the Facebook subpoena would impair or violate the relevant witnesses' constitutional rights to privacy, and whether the defendants had a "plausible justification" for building a case around the since-deleted private messages.[62] After reviewing the parties' briefs, the California Supreme Court allowed the trial judge's subpoena of Facebook to stand in a one-sentence opinion.[63]

In allowing the subpoena to stand, the California Supreme Court became the first state or federal court in the country to reach the constitutional merits of the SCA as applied to criminal defendants. Perhaps more importantly, they became the first court to uphold a functionalist "good cause" balancing test as an appropriate way to determine whether the SCA contains an implied constitutional due process exception in a given case.

The brief opinion denying review of the balancing test does not reveal much about the California Supreme Court's intentions.[64] The court had already reversed one lower court opinion finding that California's own discovery rules created an SCA exemption for criminal defense attorneys, holding that the Supremacy Clause barred a state court from interpreting the interplay between state and federal law in such a way.[65] The lower court opinion that was ultimately upheld was in its own way a form of constitutional avoidance: the trial court avoided striking down the SCA on constitutional due process grounds by creating the balancing test. In upholding the lower court ruling finding the good cause exception but not publishing much of an opinion, it is possible California was signaling to the United States Supreme Court or Congress that the issue needed resolution at the national level.

The Hunter Litigation is still ongoing. In February 2020, an intermediate court found that the trial court did not in fact conduct the "good cause" balancing test contemplated by the California Supreme Court properly, and vacated the subpoena of Facebook.[66] This opinion represented the first case of an

[62] *Id.* at 2.
[63] "The petition for review is denied." Facebook, Inc. v. Superior Court, 2019 Cal. LEXIS 6832 (Cali. Sep. 11, 2019).
[64] *Id.*
[65] Facebook Inc. v. Superior Court, 15 Cal. App. 5th 729 (Cal. App. Sep. 26, 2017).
[66] Facebook, Inc. v. Superior Court of San Francisco, 46 Cal. App. 5th 109 (C. App. Cal. 2020).

appellate court of any kind substantively grappling with the individual facts of a criminal case to determine whether the SCA should apply to a subpoena. The intermediate court thought that whether the defendants had adequately exhausted other avenues for obtaining the information was likely the determinative factor, and did not think the trial court adequately discussed options such as hiring a private investigator or issuing a subpoena against a private third party who may have communicated with the witness in question.[67] After an appeal, the case wound up before the California Supreme Court once again. In August 2020, the California Supreme Court largely agreed with the intermediate court's application of the good cause balancing test, and remanded the case to the trial court to further consider whether the defendants had exhausted all other methods of accessing the information.[68]

The California Supreme Court stated that they were "especially disinclined to resolve the important constitutional, statutory, and related issues addressed in the briefs when the underlying subpoena may not be enforceable for other reasons."[69] In this exercise of constitutional avoidance, the court once again declined to engage in the thorny constitutional balancing that the lower court's good cause test suggests. Lee and Hunter are still attempting to enforce the subpoena, and it is possible that next time the California Supreme Court will be unable to avoid resolving the question.

B. The Potential Effects of the Hunter Litigation's Good Cause Balancing Test

The Hunter Litigation does not yet represent a sea change in SCA interpretation doctrine nationwide. First, it is not clear yet that the "good cause" balancing test contemplated by the California Supreme Court has much functional strength—as discussed above, the defendants in the Hunter Litigation actually lost on the merits of the balancing test before an intermediate court.[70]

Second, the opinion does not yet have any applicability outside of California. However, as the Hunter Litigation involves a state court answering a question of federal constitutional law, it is possible that whichever party ultimately loses before the California Supreme Court would petition for a writ of

[67] *Id.* at 16. ("Turning to the factors, we conclude that the trial court did not adequately explore them, particularly options for obtaining materials from other sources, prior to issuing its order. Thus, the trial court abused its discretion.").
[68] Facebook, Inc. v. Superior Court (Touchstone), 10 Cal 5th 529 (Cal. 2020).
[69] *Id.* at 338.
[70] *Facebook, Inc.*, 2020 Cal. App. Unpub. LEXIS at 1040.

certiorari to the United States Supreme Court. Given the high stakes of this question and the unique legal issues involved, it is possible the Court would grant certiorari and consider the case.

C. The Hunter Litigation as a Window into Tensions Between Due Process and Privacy in the SCA

As discussed above,[71] the Fourth Amendment concerns over the SCA's law enforcement exemption have been extensively discussed and well-litigated. Federal courts have been willing to limit law enforcement's powers under the SCA to protect defendants' Fourth Amendment, privacy, and due process rights.[72] The Hunter Litigation reveals that when a criminal defendant seeks to access private communications held by a tech company, the constitutional concerns are not as clear-cut. When a criminal defendant seeks to use the SCA to access private communications, the defendant's due process rights under the 14th Amendment must be weighed *against* the privacy rights of a third-party witness. The SCA creates a "Constitutional Catch-22," requiring courts interpreting the statute to side with either the constitutional due process rights of a defendant or the statutory and constitutional privacy rights of a witness.

Prior to the Hunter Litigation, every court answering the question of whether a criminal defendant could subpoena a tech company under the SCA essentially used constitutional avoidance to dodge having to weigh the important constitutional interests at play on both sides. In *Wint*, the D.C. court fell back on statutory interpretation to avoid reaching the question of whether the defendant's due process rights outweighed the witness's privacy interests.[73] In *Pierce*, the Second Circuit relied on the possibility that the defendant had not actually suffered any constitutional harm to avoid having to weigh his constitutional interests at all.[74] And in *State v. Bray*, the Oregon Supreme Court dodged a debate on due process vs. privacy by holding that the defendant did not have a right to the specific piece of evidence he sought.[75]

[71] *See supra* note 27 and accompanying text.
[72] *See* Carpenter v. United States, 138 S. Ct. 2206 (2018); United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).
[73] Facebook, Inc. v. Wint, 199 A.3d 625 (D.C. Jan. 2019).
[74] United States v. Pierce, 785 F.3d 832 (2d Cir. May 2015).
[75] State v. Bray, 363 Ore. 226 (Ore. 2015).

These decisions represent different ways of avoiding the same difficult constitutional question: how to weigh a defendant's due process rights against a witness's privacy interests when considering the constitutionality of the SCA. A Supreme Court opinion could squarely address the issue by defining the exact scope of these rights. A more sustainable and workable path forward, however, would be to amend the SCA and create a uniform exemption in criminal litigation.

III. Amending the SCA to Resolve the Hunter Litigation Information Asymmetry

Broad adoption of California's good cause balancing approach to SCA subpoenas would benefit criminal defendants in some situations, but would not do enough to resolve the Constitutional Catch-22 inherent in the SCA. Inconsistent application of any kind of balancing test could also create a legal nightmare for tech companies like Facebook. Rather than waiting for the Supreme Court to resolve the issue, Congress should step in and amend the SCA to create a uniform exception for both prosecutors and criminal defense attorneys. This Part will first describe the legal dilemma the Hunter Litigation balancing test creates for tech companies like Facebook. This Part will then propose an SCA amendment to resolve the privacy and due process tensions in subpoena enforcement against tech companies.

A. The Legal Hazards of the Hunter Litigation Balancing Test

The possibility of constitutional balancing of any kind in SCA subpoena cases would drastically upend the manner in which tech companies respond to requests or subpoenas from criminal defendants. Under a constitutional due process balancing scheme, Facebook's current policy of blanket refusals to comply with subpoenas would be woefully inadequate. By initially denying all requests, Facebook's policy risks dragging the company into protracted litigation on the merits in thousands of cases a year in jurisdictions across the country.

On the other hand, a blanket policy of granting subpoenas by criminal defendants provided the subpoenas comply with other legal requirements, which is essentially the policy Facebook uses for law enforcement requests now,[76] may expose the company to considerable civil damages liability under

[76] *See* Facebook, *Safety Center*, *supra* note 49.

Section 2707 of the SCA. If Facebook were to voluntarily turn over information in a case such as the Hunter Litigation, the witness or victim whose private messages were subject to the subpoena could possibly sue Facebook under the SCA's civil damages provision. They could allege that if Facebook had contested the subpoena in court, they would have won under the constitutional "good cause" balancing test. In California and any other jurisdiction that adopts its approach from the Hunter Litigation, Facebook will be stuck between a rock and a hard place when faced with a lawful subpoena from a criminal defendant for private information.

B. A Path Forward: Amending the SCA to Create a Uniform Exception

Even if the Hunter Litigation approach is not adopted anywhere outside of California, Facebook would be wise in the short-term to begin developing an internal process for deciding whether to grant subpoenas from criminal defendants. This process will likely need to include some kind of balancing of the facts of each individual case to determine whether the company should grant the request or contest it through litigation. This may sound like a heavy burden to take on, but it would not be dissimilar from the analysis Facebook already undertakes in some countries with weaker privacy laws.[77]

To squarely resolve the Constitutional Catch-22, however, Congress should amend the SCA to create a uniform exception for prosecutors and criminal defense attorneys. To avoid the legal hazard discussed supra, tech companies like Facebook should support an advocacy effort for such an amendment. From a business perspective, this would create the most stability in SCA doctrine and the most predictability in how these cases will turn out. Facebook likely does not want to have to guess how an individual judge will rule on a constitutional due process balancing test that requires weighing multiple case-specific factors. If Congress were to extend the SCA "law enforcement" exception to criminal defendants, defendants' rights will be protected, and tech companies will not have to engage in a costly legal analysis every time they receive a subpoena.

[77] *See* TRANSPARENCY REPORT: GLOBAL OVERVIEW OF GOVERNMENT DATA REQUESTS, FACEBOOK (2020), https://transparency.facebook.com/government-data-requests.

From a constitutional perspective, a uniform exception would eliminate the information asymmetry between prosecutors and defense attorneys over SCA questions. Critics might argue that a uniform exception would compromise witness privacy rights. However, the SCA's exception for law enforcement already creates a risk of privacy compromise in practically any criminal prosecution, so extending the exception to defense attorneys likely would not create further risk. And if lawmakers were concerned it would, they could include in the amendment a provision requiring all evidence produced under the SCA exceptions to initially be filed under seal. Such a provision would probably also have the added benefit of reducing prosecutorial overreach in SCA cases in the first place.

Conclusion

Derrick Hunter and Lee Sullivan may still be convicted of murder in the end. If the California Supreme Court does not wish to wade into the swampy specifics of the good cause balancing test it authorized, it may let the most recent lower court opinion stand and bar Hunter and Lee from subpoenaing Facebook. Seven years after Jaquan Rice's murder, their case would go to trial. The constitutional issues raised in the Hunter Litigation are likely to reverberate far beyond Hunter and Sullivan's case. The litigation could force courts nationwide to confront difficult constitutional questions of privacy and due process in the social media era that they have thus far avoided. To better protect due process rights and provide legal stability, Congress should step in and amend the SCA to create a uniform exception that covers criminal defense attorneys. Derrick Hunter and Lee Sullivan have been caught in a Constitutional Catch-22 for eight years. It is time to try something new.

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Date of JD/LLB	**May 19, 2021**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court Student Editor** **Harlan Fiske Stone Moot Court Director (upper-year moot court competition)** **Foundation Moot Court Student Judge (first year moot court program)**

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April 1, 2022

The Honorable John D. Bates
United States District Court Judge
U.S. District Court for the District of Columbia
333 Constitution Avenue, Northwest
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Dear Judge Bates:

I hope this letter finds you safe and well. I respectfully request your consideration of my candidacy as a rules law clerk for the 2022–2023 term.

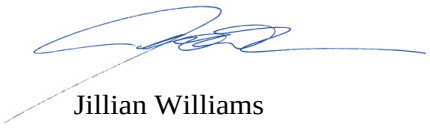
I am a recent graduate of Columbia Law School and a first-year associate at Arnold & Porter Kaye Scholer LLP in Washington, DC. I am particularly drawn to the rules law clerk position given my professional and academic interests in procedural law and the opportunity to support both the work in chambers as well as the Standing and Rules Committees. Additionally, as someone who considers procedure to be a vehicle for substantive law, I relish the idea of studying the function and effect of the federal rules, and assisting with amendment proposals and other rules-related committee work.

I believe that I would make a strong addition to your chambers. At the firm, I have continued to hone my legal research, writing, and analytical skills by assisting with deposition and direct examination preparation, appellate preservation, summary judgment, and *in limine* motions, as well as through intensive factual and statutory research. At Columbia, I took coursework in empirical analysis and advanced civil procedure, and worked with civil procedure, federal courts, and criminal procedure faculty to craft an upper-year moot court problem centered on the False Claims Act and the Paycheck Protection Program. I also have ample experience working in fast-paced, high-stakes environments with a wide-variety of people, having worked as an organizer and election compliance officer prior to law school.

Enclosed, please find my resume, transcript, and writing sample. Letters of recommendation have been uploaded to OSCAR.

Thank you again for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,



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EDUCATION

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2021 Campbell Award, Columbia Alumni Association (for exceptional leadership and school spirit)
2019 Stevens Fellow, Justice John Paul Stevens Fellowship Foundation
Note: *All Offenses Included? Predicate Inclusion and the Travel Act Post*-United States v. Davis
Activities: Harlan Fiske Stone Moot Court Program Director (upper-year honors moot court competition)
Head Teaching Assistant to Professor Jane C. Ginsburg (Legal Methods II, Spring Term 2021)
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Faculty Student Affairs Committee, Diversity & Inclusion Subcommittee, Member
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Minor: Political Science
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Summer Reading Committee

EXPERIENCE

ARNOLD & PORTER KAYE SCHOLER LLP, Washington, DC
Law Clerk September 2021–Present
Researched case law on jury deliberations and appellate preservation for use in products liability cases. Conducted administrative record research. Assisted with deposition preparation, motions for summary judgment, sword/shield *in limine* motion, direct examination outlines, and plaintiff and expert witness preparation in large-scale voting rights pro bono case.

THE HONORABLE ROBERT D. SACK
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, New York, NY
Judicial Extern Spring 2021
Reviewed and summarized trial records and parties' briefings. Researched and analyzed cases. Assisted with and drafted bench memoranda.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW, New York, NY
Volunteer Election Protection Captain August 2020–November 2020
Supervised teams of nonpartisan election protection project volunteers. Responded to voter and volunteer questions regarding voter registration, absentee and early voting, accessibility, electioneering, and voter intimidation.

ARNOLD & PORTER KAYE SCHOLER LLP, Washington, DC
Summer Associate Summer 2020
Researched and wrote memoranda on pending Alien Tort Statute litigation and the intersections of the First Amendment and Title VI on college campuses. Analyzed federal statutes and local ordinances concerning the deployment of federal officers on protestors.

U.S. ATTORNEY'S OFFICE, SOTHERN DISTRICT OF NEW YORK, New York, NY
Legal Extern, General Crimes & Complex Frauds and Cybercrime Units Fall 2019
Assisted with investigations, trial, and motions preparation. Drafted criminal complaints. Researched and wrote memoranda on viability of federal criminal charges and appellate issues.

U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, Washington, DC
Legal Intern, Public Integrity Section Summer 2019
Researched and wrote memoranda on federal and state public corruption laws. Drafted sentencing memorandum. Conducted 50-state survey of state bribery laws for conference use. Wrote jury instructions and expert witness notices.

INTERESTS

Downhill Skiing, Squash, Hiking, Comic Books

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Program: Juris Doctor

Jillian M Williams

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6246-1	Advanced Administrative Law	Strauss, Peter L.	3.0	B+
L6670-2	Columbia Law Review Editorial Board		1.0	CR
L6664-1	Ex. Federal Appellate Court	Cepeda Derieux, Adriel I.; Parker, Barrington; Sack, Robert D.	1.0	CR
L6664-2	Ex. Federal Appellate Court - Fieldwork	Cepeda Derieux, Adriel I.; Parker, Barrington; Sack, Robert D.	3.0	CR
L6788-1	Executive Board of the Moot Court	Strauss, Ilene	1.0	CR
L6274-1	Professional Responsibility	Meyer, Janis	2.0	B+
L8664-1	S. Advanced Civil Procedure: Scholarly and Lawyerly Perspectives	Kaplan, Roberta; Tenzer, Gabrielle	2.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Strauss, Ilene	1.0	CR
L6822-1	Teaching Fellows	Ginsburg, Jane C.	1.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-2	Columbia Law Review Editorial Board		1.0	CR
L6231-1	Corporations	Talley, Eric	4.0	B
L6688-1	Executive Board of the Moot Court	Strauss, Ilene	1.0	CR
L6425-1	Federal Courts	Metzger, Gillian	4.0	B+
L9893-1	S. Advanced Issues in the First Amendment	Bollinger, Lee C.	1.0	A
L9080-1	S. Black Letter Law / White Collar Crime	Coffee, Jr., John C.; Rakoff, Jed	2.0	A-
L6822-1	Teaching Fellows	Purdy, Jedediah S.	2.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	CR
L6169-1	Legislation and Regulation	Briffault, Richard	4.0	CR
L6781-1	Moot Court Student Editor II	Strauss, Ilene	2.0	CR
L6683-1	Supervised Research Paper	Louk, David S	1.0	CR
L6822-1	Teaching Fellows	Strauss, Ilene	1.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	B
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B+
L6603-2	Ex. Federal Prosecution: U.S. Attorney's Office for the S.D.N.Y. - Fieldwork	Crowley, Shawn Geovjian; Gerber, Michael	2.0	CR
L6603-1	Ex. Federal Prosecution: U.S. Attorney's Office for the SDNY	Crowley, Shawn Geovjian; Gerber, Michael	2.0	CR
L6675-1	Major Writing Credit	Richman, Daniel	0.0	CR
L6681-1	Moot Court Student Editor I	Strauss, Ilene	0.0	CR
L6683-1	Supervised Research Paper	Richman, Daniel	2.0	A
L6674-1	Workshop in Briefcraft [Minor Writing Credit - Earned]	Strauss, Ilene	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-3	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B
L6108-4	Criminal Law	Harcourt, Bernard E.	3.0	B+
L6172-1	Empirical Analysis of Law	Fagan, Jeffrey A.	3.0	B
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-26	Legal Practice Workshop II	Smith, Elizabeth	1.0	P
L6116-2	Property	Briffault, Richard	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Methods of Statutory Drafting and Interpretation	Ginsburg, Jane C.; Louk, David S	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-5	Civil Procedure	Lynch, Gerard E.	4.0	B
L6105-1	Contracts	Kraus, Jody	4.0	B
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-26	Legal Practice Workshop I	Newman, Mariana; Smith, Elizabeth	2.0	P
L6118-3	Torts	Tani, Karen	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 87.0

Total Earned JD Program Points: 87.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	Campbell Award	3L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	3.4

WRITING SAMPLE

Jillian M. Williams
816 E St NE, Apt 1502
Washington, DC 20002
(248) 925-2451

As a first-year associate at Arnold & Porter Kaye Scholer LLP, I drafted the attached section of our opposition to defendants' motion for summary judgment in a voting rights *pro bono* matter. This section of the brief addresses whether plaintiffs have standing to challenge the constitutionality of Florida Senate Bill 90 (2020), which targeted the use of vote-by-mail ballots, secure drop boxes, and organized voter registration and in-line support efforts.

Please note that some citations do not have ECF numbers as the exhibits had yet to be filed with the court at the time of this draft. The underlying sources are indicated in parentheses.

To preserve client confidentiality, all individual and organization names have been redacted. I have received permission from my employer to use this section of the brief as a writing sample.

SB 90 - Draft - Opposition to Defendants' Motion for Summary Judgment

I. Plaintiffs Have Standing

In general, to establish standing, a plaintiff must prove they have suffered (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992), for each statutory provision. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006). An organization can demonstrate an injury in fact when it challenges conduct "that *impedes its ability to attract members, to raise revenues, or to fulfill its purposes*." *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004) (emphasis added) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

Defendants Lee and Supervisors of Elections Doyle and Hays (hereinafter, Defendants) only challenge plaintiffs' claim that they have suffered injury in fact and do not challenge this Court's order that the injury and redressability are established. *See* ECF 245-1 at 6–22; ECF 201 at 25–28 & n.5 (holding that Plaintiffs' injuries as to the drop box restrictions are traceable Defendant Supervisors and Defendant Lee, that vote-by-mail application requirements and "line warming ban" are traceable to the Defendant Supervisors only, and their injuries with respect to the registration disclaimer and delivery requirements are traceable to Defendant Lee); *Id*. at 31 ("[E]njoining Defendant Lee and Defendant Supervisors from enforcing the drop box restrictions, enjoining Defendant Supervisors from enforcing the vote-by-mail identification requirements and the "line warming ban," and enjoining Defendant Lee from enforcing the voter registration disclaimer and delivery requirements all have the practical effect of redressing Plaintiffs' alleged injuries.").

Defendants fail to articulate the correct standard and insist that injury in fact can only be shown if an organization shows the activities it "would divert resources away from in order to spend additional resources on combatting" illegal acts. ECF 245-1 at 6. But this is only one way that injury can be established. Injury in fact can also be established where defendant's actions "impair the organization's ability to engage in its own projects . . . ." *Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 & n.14 (11th Cir. 2008) (holding that standing exists when an organization's "ability to conduct specific projects during a specific period of time will be frustrated"). Indeed, other courts have broadly construed injury in fact to encompass the kinds of frustration of organizational purpose that the Court recognized in *Havens Realty Corp.*, even without specifying the activities that funds would be diverted from. *See, e.g., League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59 (D.S.C. 2020), *appeal dismissed and remanded*, 849 F. App'x 39 (4th Cir. 2021) ("Harm occurs if an organization's ability to function or to provide its core services is impaired by an allegedly unlawful action, and it suffers "the consequent drain of [its] resources" as a result, that organization has standing to bring suit." (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 369 (1982) (superseded on other grounds by statute 42 U.S. § 3613(a)(1)(A)))).

In addition to organizational standing, an organization may have associational standing to sue "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021).

To establish standing at the summary judgment phase, parties must set forth by affidavit or by other means specific facts to support their standing claim. *See Lujan*, 504 U.S. at 563 (emphasis added) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). Plaintiffs have done so here. Despite defendants' selective citation of the record and precedent, it is clear from the plaintiffs' testimony that, for each of the challenged provisions, at least one plaintiff has standing to sue.

A. Plaintiffs Have Standing Because Section 97.0575's Voter Registration Delivery and Disclaimer "Frustrates their Organizational Missions" By Creating Additional Staffing and Financial Burdens.

As this Court has recognized, "both the Plaintiffs' diversion of resources and First Amendment injuries are cognizable injuries-in-fact" for standing purposes. ECF 201 at 16. In a similar case challenging voter election laws, this Court found similar to the Seventh, Fifth, and Ninth Circuits that voter-advocacy and outreach organizations had standing where the injury-in-fact included "unwanted demands on [the organization's] resources," "extra time spend educating voters about a new law instead of . . . normal 'get out the vote activities,'" and diverting resources from its "organizational purpose." Order on Mot. for Prelim. Inj. at 13 n.8, *Dream Defenders v. DeSantis*, No. 4:20-cv-00485-MW-MAF (N.D. Fla. filed Oct. 9, 2020) ("*Dream Defenders* Order").

In this present case, plaintiff [redacted] will have to hire new staff, *see* ECF __ ([redacted] Decl. ¶¶ 8–9, 12) (describing the need for additional quality control staff as well as staff time more broadly); and plaintiffs [redacted] and [redacted] have described the voter registration delivery and disclaimer requirements as "cost prohibitive," and causing prospective voters to decline to complete their voter registration, respectively. *See* ECF __ ([redacted] Dep. 59:12–60:3) (describing how, in Miami-Dade County, they "are bound to identify and come in contact with people who don't live in [that] county[,]" and how the process of now sorting, mailing, or

driving voter registration cards to the correct county "would have . . . been cost prohibitive"); ECF __ ([redacted] Decl. ¶ 19) ("SB 90's disclaimer requirement has resulted in several prospective voters declining to complete their voter registration with [redacted] out of fear that their voter registration application would not be timely delivered. On average, [redacted] has seen 1–3 individuals a week decline to register because of the confusion caused SB 90's disclaimer requirement.").

Plaintiffs [redacted] and [redacted] have also sufficiently "set forth by affidavit or other specific facts to support their standing claim." *Lujan*, 504 U.S. at 563. [redacted], which operates in Orange, Osceola, and Hillsborough Counties, *see* ECF __ ([redacted] Dep. at 10:22–11:22) has testified that because they lack the resources to deliver voter registrations in multiple counties, as Section 97.0575 requires, that they may be unable to comply with the law. By contrast, in previous years, [redacted] was only required to as they were previously able to deliver voter registrations for multiple counties to Orange County only. *See id.* at 36:3–38:3. Additionally, plaintiff [redacted] noted that they would have to raise additional funds to cover the cost of additional staff and training—specifically, staff beyond their typical legal compliance officers. *See* ECF __ ([redacted], Vol. 1. Dep. at 98:9–25). This too is an "unwanted demand" on plaintiff's resources, see *Dream Defenders* Order, at 13 n.8, and effectively frustrates plaintiff's programming by refocusing its resources from its goal. *See Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008).

Accordingly, defendants' claims that plaintiffs have not sufficiently alleged injury in fact are without merit as it both ignores testimony given during depositions and fails to address Eleventh Circuit precedent that frustration of purpose and diversion of resources constitute injury in fact.

B. Section 101.69's Drop Box Restrictions Impede Plaintiffs' Organizational Purpose And Require Significant Changes in Activities and Spending .

Plaintiffs have standing to sue on the grounds that plaintiffs' need to divert resources and cancel programming to comply with Section 101.69 constitute a cognizable injury that is fairly traceable to the Supervisors of Elections. Consequently, Defendants' claims that [redacted] lacks organizational standing are not supported by the record and mischaracterizes the underlying reasons for its change in programming.[1] Since the enactment of SB 90, "[redacted] has spent time, money, and resources on training staff for implementation of the changes mandated by SB 90." ECF __ ([redacted] Dep. ¶ 7). "These meetings and strategizing sessions [have] divert[ed] . . . time and resources from activities we previously anticipated launching during this time. Such activities include, but are not limited to, a robust municipal elections voter education, voter registration and voter turnout program with Souls to the Polls events." *Id.* ¶ 8. And [redacted] chose to suspend its Souls to the Polls program, specifically because it did not have the capacity to do further research on how the supervisors of elections would elect to staff drop boxes in light of the twenty-four hour surveillance requirement imposed by Section 101.69. *See* ECF __ ([redacted] Dep. at 51:8–53:1). Both the diversion of resources and the cancellation of its signature programming are consistent with the Eleventh Circuits holdings in *Arcia* and *Browning*. *Compare, e.g.,* ECF ___ ([redacted] Dep. at 51:8–53:1, 72:14–74:14) (describing how Equal Ground had to hire a program manager not originally within the budget and begin printing voter education cards earlier than expected), *with Arcia v. Sec'y of Fla.,* 772 F.3d 1335, 1341 (11th Cir. 2014) ("Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts *impair the organizations' ability to engage in its own projects* by forcing

[1] Plaintiffs do not contend that [redacted] has associational standing since [redacted] does not have members. *See* ECF __ ([redacted] Dep. at 14:8–9).

the organization to divert resources in response.") (emphasis added) *and Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) ("[A]n organization suffers an injury in fact when *a statute 'compel[s]' it to divert more resources to accomplishing its goals*.") (emphasis added).

C. Section 101.62(1)(b) Vote-by-mail Application Restriction Also Frustrated Plaintiffs Mission to Register Voters.[2]

Plaintiffs have standing to sue on the grounds that Section 101.62(1)(b), which requires voters to provide either a Driver's License, State identification number or Social Security number that matches the number in the FVRS for that voter when requesting a mail ballot, hinders their organizational purpose by making it more difficult for staff to help voters request vote-by-mail applications. Specifically, for plaintiff [redacted], complying with the new identification requirement will require additional staff time in the form of workshops or webinars to ensure that their staff are adequately prepared to assist voters. *See* ECF __ ([redacted] Dep. at 79:14–75:1) (noting the difficulty of convincing people to provide personal identification information and how plaintiff "envision[s] a scenario where a ten-minute interaction results in maybe a half-hour to a 45-minute interaction, because not only are you completing the application, but you are explaining or reassuring and allaying the fears of the client sitting next to you").

Besides [redacted], [redacted] is equally injured by the VBM application restriction. Plaintiff [redacted] testified that the additional time and other burdens of this provision create an obstacle to the organization's mission of voter education. *See* ECF __ ([redacted] Dep. at 53:1–55:9) ("It is now a more onerous process to get voters to provide their Social Security Number,

[2] The Secretary of State in her motion describes this as the "vote-by-mail identification provision." *See* ECF 245-1 at 1. We refer to it here as an application restriction based on the undue burden it places on plaintiffs. *See* section IV *infra*.

last four of their social or their Florida ID or their driver's license number, whereas this process was very simple before. . . . Now there has to be additional information provided, which is challenging for our community.· It's an obstacle for us [and] our community . . . .").

D. Plaintiffs Injuries As a Result of Sections 102.031(4)(a)–(b)'s Line-Warming Prohibition Are Sufficient to Confer Standing.

Lastly, plaintiffs have standing to challenge Sections 102.031(4)(a)–(b), which prohibit anyone from "engaging in any activity with the intent to influence or effect of influencing a voter" inside a polling place or within 150 feet of a drop box or polling place, impedes their mission by forcing them to suspend their line warming activities. See sections I.D(1)–(3) infra. Currently, plaintiffs [redacted], [redacted], [redacted], and [redacted] all provide some form of in-line voter assistance. But as a result of SB 90, each organization has had to change or suspend its activities altogether.

1. [redacted]

As discussed above, [redacted] has declined to implement its Souls to the Polls program this year as a result of SB 90. *See* section I.B *supra*. Prior to enactment of SB 90, [redacted] Souls to the Polls Program was a "robust" program that "help transport Black voters throughout Florida to polling locations and offer to answer questions about the voting process." *See* ECF __ ([redacted] Decl. ¶ 19–20). Further, [redacted] has testified that "SB 90's new line warming restriction has severely hindered [them] from offering assistance in a practical and meaningful way to voters because [they] have had to stay much further from polling locations than we ever had to before the law was in place." *Id.* ¶ 23. According to declarants, "[t]he law has also forced us to majorly pull back our musical and live entertainment events." *Id.* Again, this diversion of resources

to programs other than Souls to the Polls constitutes a cognizable injury-in-in fact under *Arcia* and *Browning*, since it "frustrates" one of [redacted] organization purposes, and thus supports a finding of injury in fact for the purposes of standing. *See Arcia v. Florida Sec'y of State*, 772 F.3d at 1341 (holding that an organization has standing when a defendant's acts "impair the organization's ability to engage in its own projects . . . .").

2. [redacted]

Plaintiff [redacted] testified that it regularly has handed out food, water, and umbrellas, at long lines at voting places in Miami-Dade, Broward, Palm Beach, Duval, Hillsborough, Orange, and Osceola Counties. *See* ECF __ ([redacted] Dep., Vol. 1 at 59:63–62:8). Florida Rising describes its mission as "expand[ing] democracy and advocat[ing] for communities that have been historically marginalized" through its programming. *See id.* 75:1–80:12. As a result of SB 90's line warming provision, [redacted] "ability to engage in its own projects" has been impaired such that they are unsure if they can continue to do line warming activities. *Arcia*, 772 F.3d at 1341; ECF __ ([redacted] Dep., Vol. 1 at 77:1–80:12). The Eleventh Circuit made clear in *Arcia* that merely preventing a group from hosting its own programs is sufficient for a finding of standing, *see Arcia*, 772 F.3d at 1341, and Florida Rising testified that they would have to "develop new strategies to communicate with [voters]" and create additional content, strategies, and technologies to encourage people to stay in line and vote. ECF __ ([redacted] Dep., Vol. 1 at 77:1–80:12). This is more than sufficient to confer standing. S*ee Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) (holding that even "[a] small injury, 'an identifiable trifle,' is sufficient to confer standing).

3. [redacted]

Plaintiff [redacted] testified that "SB-90's expanded definition of activities banned inside the non-solicitation zone has impacted [redacted] voter assistance work in ways that have required it to shift resources away from other programmatic activities and required it to overhaul, and in some cases, dismantle its programming as a result of new restrictions on assisting voters." ECF __ ([redacted] Decl. ¶ 6). Prior to SB 90, [redacted], "provided and supported voter assistance activities to help Latino Floridians vote during election day and early voting, including the provision of language assistance to limited English proficient voters, rides and physical assistance to disabled voters, and refreshments and phone chargers to voters waiting in line to vote." *Id.* ¶ 5. They also paid canvassers to provide language assistance and election protection services to voters in Orange and Osceola counties, accompanying voters into the polls with Spanish-dominant voters who requested translation assistance. *Id.* Lastly, [redacted] workers have provided snacks, soft drinks, water, and phone charge stations to voters from outside the no-solicitation zone in Orange and Osceola Counties (voters would then take these items with them the non-solicitation zone). *Id.* ¶¶ 10–11.

In response to SB 90, [redacted] is assessing whether all of these programs—"language assistance, assistance to disabled voters, and distributing refreshments that voters bring with them in line are now prohibited inside the no solicitation zone under SB 90." *Id.* ¶ 12. "[redacted] is [further] assessing whether it will spend more money on promotional banners advertising refreshments and Spanish-language voter assistance to continue to effectively engage voters at the polls, which is more challenging under SB 90." *Id.* This assessment of programming, much like plaintiff Florida Rising's need to "develop new strategies" is more than enough to confer sanding, and is consistent with both *Arcia*'s and *Billups*' holdings. *See Arcia*, 772 F.3d at 1341; *Common*

Cause/Ga. v. Billups, 554 F.3d 1340, 1351 (11th Cir. 2009) (holding small, inconvenient injurie are sufficient to establish standing).

5. [redacted]

Plaintiff [redacted] provides language assistance at the polls and at early voting sites to Spanish-dominant voters, all within the 150-feet no-solicitation zone.. *See* ECF __ ([redacted] Decl. ¶¶ 7–9, 11–13). SB 90's prohibition on even nonpartisan activity inside the no-solicitation zone would bar them from line-warming activities. *See* ECF __ ([redacted] Dep. at 55:10–56:10). [redacted] has also testified that it has had to update its materials specifically to comply with Section 102.031. *See id.* While defendants content that this injury is too speculative to satisfy injury prong of standing at summary judgment, *see* ECF 245-1 at 17, this Court has held that even small injuries are sufficient to confer standing. *See* ECF 201 at 21 (citing first *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("A small injury, 'an identifiable trifle,' is sufficient to confer standing.") and then quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).

Applicant Details

First Name	**Alyssa**
Last Name	**Wu**
Citizenship Status	**U. S. Citizen**
Email Address	**ajwu@uchicago.edu**
Address	**Address** Street **1806 Bonita Road** City **San Pablo** State/Territory **California** Zip **94806** Country **United States**
Contact Phone Number	**4085057623**

Applicant Education

BA/BS From	**University of California-Irvine**
Date of BA/BS	**June 2016**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 12, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Alyssa Wu
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February 17, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am a first-year litigation associate at Covington & Burling in San Francisco, and I write to express my interest in the Rules Law Clerk position. I was so excited to see your post for this unique position on OSCAR. The opportunity to assist with your casework would, of course, be invaluable to my development as a trial lawyer. But it was my interest in procedural issues that originally brought me to litigation, and I would be delighted to spend a year studying the Rules in depth and contributing to their continued evolution. As an undergraduate, I was deeply involved in empirical social and physical science research. At the firm, I am continually honing my research, writing, negotiation, and management skills. I believe I have the intellectual flexibility and grit to excel at the varied duties of the Rules Law Clerk.

Enclosed please find a copy of my resume, transcript, and writing sample. My writing sample is an excerpt of a paper I wrote in Winter 2020 discussing evidentiary issues presented by blockchain technology. In addition, letters of recommendation from Professors William Hubbard, John Rappaport, and Cree Jones will be transmitted from the University of Chicago Law School.

Please let me know if there is any other information that would be helpful to you. Thank you kindly for your consideration.

Respectfully,
Alyssa (“AJ”) Wu

ALYSSA ("AJ") WU

CA SBN 339651 · (408) 505-7623 · alyssajwu@gmail.com

EDUCATION

The University of Chicago Law School, Chicago, IL
JD (June 2021)

- University of Chicago Law Review
- Dean's Award (best exam in a section of Civil Procedure II)

University of California, Irvine, Irvine, CA
BS Earth System Science; BA Economics (June 2016)

- Phi Beta Kappa
- Campuswide Honors Program
- Excellence in Undergraduate Research (awarded to one student in Physical Sciences)

EXPERIENCE

Covington & Burling, San Francisco, CA
Associate (September 2021 – present)

- Prepared and deposed witnesses in multimillion-dollar insurance coverage dispute
- Developed document review protocol and coordinated review of 900,000 documents by 12 contract attorneys in FinTech privacy class action
- Researched and drafted various pre-trial motions and memoranda

Summer Associate (June – July 2020)

- Researched and drafted discovery and jurisdictional motions in patent, class action, and appellate litigation
- Assisted partners in preparing business development and regulatory presentations
- Researched history and language of anti-corruption provisions in infrastructure bills

US Department of Justice, Washington, DC
Legal Intern, Antitrust Criminal I Section (August – December 2020)

- Researched antitrust, fraud, and corruption crimes and procedure
- Developed facts from civil complaints, affidavits, and news reports to assist trial attorneys in pursuing new investigations and indictments
- Reviewed ESI for privilege, analyzing crime-fraud and common interest exceptions

Environmental Law Institute, Washington, DC
Law Clerk (June – September 2019)

- Assisted in developing workshops to educate judges on climate and attribution science
- Reviewed international agreements and academic scholarship on public international law topics, including trade and sustainability initiatives

Hakkasan, San Francisco, CA
Barback (January – August 2018)

- Prepared and served cocktails, beer, and wine according to fine dining standards of customer service in a fast-paced, high-volume setting
- Trained new employees on menus, opening and closing procedures, and restaurant operations

THE UNIVERSITY OF CHICAGO

Name: Alyssa Wu
Student ID: 12210720

University of Chicago Law School

Degrees Awarded

Degree: Doctor of Law
Confer Date: 06/09/2021
Degree GPA: 177.797
J.D. in Law

Academic Program History

Program: Law School
Start Quarter: Autumn 2018
Current Status: Completed Program
J.D. in Law

External Education

University of California, Irvine
Irvine, California
Bachelor of Arts 2016

University of California, Irvine
Irvine, California
Bachelor of Science 2016

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2018

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Geoffrey Stone	3	3	176
LAWS	30211	Civil Procedure I Anthony Casey	3	3	178
LAWS	30311	Criminal Law Genevieve Lakier	3	3	177
LAWS	30611	Torts Jennifer Nou	3	3	178
LAWS	30711	Legal Research and Writing Cree Jones	1	1	180

Winter 2019

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	3	3	177
LAWS	30411	Property Lee Fennell	3	3	177
LAWS	30511	Contracts Omri Ben-Shahar	3	3	177
LAWS	30611	Torts Adam Chilton	3	3	178
LAWS	30711	Legal Research and Writing Cree Jones	1	1	180

Spring 2019

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II William Hubbard	3	3	184
LAWS	30411	Property Lee Fennell	3	3	177
LAWS	30511	Contracts Omri Ben-Shahar	3	3	177
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Cree Jones	2	2	178
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	182

Honors/Awards
The Dean's Award, for best exam in a section of Civil Procedure II by a first-year student

Summer 2019

Honors/Awards
The University of Chicago Law Review, Staff Member 2019-20

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations Anthony Casey	3	3	177
LAWS	43250	Privacy Lior Strahilevitz	3	3	177
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	181
LAWS	53264	Advanced Legal Research Todd Ito	2	2	179
LAWS	94110	The University of Chicago Law Review Richard Mcadams	1	1	P

Date Issued: 10/10/2021

THE UNIVERSITY OF CHICAGO

Name: Alyssa Wu
Student ID: 12210720

University of Chicago Law School

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	42505	Blockchain and Cryptocurrencies Anup Malani	3	3	178
LAWS	42801	Antitrust Law Randal Picker	3	3	178
LAWS	46101	Administrative Law David A Strauss	3	3	177
LAWS	94110	The University of Chicago Law Review Richard Mcadams	1	1	P

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	43244	Patent Law Jonathan Masur	3	3	EP
LAWS	44121	Introductory Income Taxation Daniel Hemel	3	3	EP
LAWS	53254	Patent Litigation Jason Wilcox Steven Cherny	3	3	EP
LAWS	53297	Law and the Economics of Natural Resources Markets Richard Sandor	3	3	EP
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Richard Mcadams			

Summer 2020

Honors/Awards
The University of Chicago Law Review, Staff Member 2020-21

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Fred Smith	3	3	174
LAWS	41601	Evidence Geoffrey Stone	3	3	178
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	176
LAWS	53313	Derivatives in the Post-Crisis Marketplace	3	3	179
Req Designation:		Meets Writing Project Requirement Jaime Madell			
LAWS	95030	Moot Court Boot Camp Rebecca Horwitz Madeline Lansky	2	2	P

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure William Baude	3	3	181
LAWS	43208	Advanced Civil Procedure William Hubbard	3	3	174
LAWS	50105	Buddhism and Comparative Constitutional Law Benjamin Schonthal Thomas Ginsburg	2	2	178
LAWS	53271	Contract Drafting and Review Michelle Drake Joan Neal	3	3	177

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Genevieve Lakier	3	3	176
LAWS	53324	Advanced Interpretation: Law and Language Thomas Lee	3	3	177
SOCI	30531	Are we doomed? Confronting the End of the World Daniel Holz James Evans	3	3	A-

Honors/Awards
Completed Pro Bono Service Initiative

End of University of Chicago Law School

The Admissibility of Blockchain as Evidence

Alyssa Wu

This writing sample contains excerpts—the Introduction, Part III, and the Conclusion—from my final paper for a Winter Quarter 2020 seminar entitled Blockchain & Cryptocurrencies. The paper explores potential obstacles to blockchain records as admissible evidence at trial.

Table of Contents

Introduction

Blockchain has been touted as a revolution in the digital economy,[1] comparable in impact to personal computers and the Internet themselves.[2] Fundamentally, a blockchain is simply a digital ledger. The innovation comes in the form of three main features: immutability (transactions can be added but not deleted),[3] transparency (the database is readable by all participants),[4] and decentralization (each "node" in the network stores a copy of the record).[5] Originally developed in tandem with the cryptocurrency Bitcoin,[6] blockchain plays a role analogous to that of a bank in the world of fiat currency. Code acts as the "trusted third party" that would otherwise be needed to prevent theft or counterfeit.[7]

Transactions on the blockchain occur in three basic steps, which can be demonstrated with a Bitcoin payment. First, the owner of a coin announces a transfer to another user.[8] Several of these transactions are grouped in a block. Next, nodes "mine," or compete to validate blocks by solving a computational puzzle.[9] Bitcoin uses a "proof-of-work" system—essentially a guess-and-check race, such that the probability of winning is proportional to computational power.[10] The first miner to find a correct solution is rewarded in bitcoin, and the information is securely compressed

[1] Aaron Wright & Primavera De Filippi, *Decentralized Blockchain Technology and the Rise of* Lex Cryptographia 4 (2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664.

[2] *See, e.g.*, Marc Andreessen, *Why Bitcoin Matters*, N.Y. Times DealBook (Jan. 21, 2014), *archived at* https://perma.cc/ZG4B-W9JS; Albert Wenger, *Bitcoin as Protocol*, Union Square Ventures (Oct. 13, 2013), *archived at* https://perma.cc/B4FM-5VC6.

[3] Michael Siliski, *What Are Blockchains Actually Good For?*, Medium (March 20, 2018), *archived at* https://perma.cc/8NCV-Z6AG.

[4] *Id.*

[5] Jean Bacon et al., *Blockchain Demystified: A Technical and Legal Introduction to Distributed and Centralized Ledgers*, 25 Rich. J.L. & Tech. 2, 29 (2018).

[6] *Blockchains: The Great Chain of Being Sure About Things*, Economist (Oct. 30, 2015), *archived at* https://perma.cc/DQL9-U9XS.

[7] *Id.*

[8] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, 2 (2008).

[9] *Id.* at 3–5.

[10] Arvind Narayanan et al., Bitcoin and Cryptocurrency Technologies 63–67 (Princeton 2016).

and appended to the chain. Finally, the block is copied to every computer on the network. The longest chain, reflecting the greatest agreement, is accepted as true.[11]

Requiring agreement across the network ensures the accuracy and security of cryptocurrency.[12] The database is theoretically vulnerable if a miner (or, more likely, a mining pool[13]) gains control over a majority of the computing power in a network.[14] In a so-called 51 percent attack, the attacker can execute illegitimate transactions and obstruct legitimate ones.[15] But with any less than a majority of the computing power, it is effectively impossible to hijack a blockchain.[16] Further, the value of a coin tends to plummet following an attack. Therefore, in the long run, staging an attack may be economically unfavorable to a 51 percent miner, who would have made enormous investments in hardware and could instead reap continuous returns by mining honestly.[17] This incentive structure—requiring massive, otherwise worthless investments of time and energy and giving payoffs only for those transactions that the network agrees on—virtually guarantees that legitimate transactions are irreversibly recorded, while illegitimate transactions are rejected.[18]

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[11] Nakamoto, *supra* note 9, at 5.

[12] Anthony Lewis, *A Gentle Introduction to Blockchain Technology*, BRAVENEWCOIN (Oct. 11, 2017), *archived at* https://perma.cc/4DSS-4U5T.

[13] Most miners nowadays join pools, where they aggregate their resources, exchanging commissions to pool managers for a predictable income and economies of scale. *See generally* Lin William Cong, Zhiguo He, and Jiasun Li, *Decentralized Mining in Centralized Pools* (Nat'l Bureau of Econ. Research, Working Paper No. 25592, 2019). Mining is now concentrated in 20 major mining pools, just four of which control over half of all Bitcoin mining. *See Pool Distribution*, BTC.COM (accessed March 28, 2020).

[14] *See* Narayanan et al., *supra* note 11, at 159–60.

[15] In fact, hackers have succeeded in exploiting this vulnerability in the past. Most famously, in early 2019, a hacker hijacked the Ethereum blockchain and double-spent over $1 million worth of the Ethereum coin. Small blockchains are especially vulnerable, because they have fewer "honest nodes" to overtake; the same goes for even large blockchains during periods of relative inactivity. *See* Alex Lielacher, *ETC 51% Attack: What Happened and How It Was Stopped*, BRAVENEWCOIN (Jan. 14, 2019), *archived at* https://perma.cc/24BC-63CE.

[16] Narayanan et al., *supra* note 11, at 72.

[17] *Id.* at 92.

[18] *Great Chain*, *supra* note 6.

Since the advent of blockchain, its use cases have expanded into large-scale financial transactions,[19] along with government services,[20] supply chain management,[21] and recording property rights.[22] In addition, blockchain technology enables the execution of smart contracts, whose terms are coded as a series of if-then functions.[23] By automating agreements, smart contracts boast potential reductions in transaction costs and mitigation of risk.[24] Recording and verifying information for these applications works much the same way as for Bitcoin.[25]

For all their promise, blockchains are only valuable in business[26] insofar as they are admissible in litigation as evidence of transactions.[27] Since the 2006 amendments to the Federal Rules of Civil Procedure introduced electronically stored information (ESI) as a new category of discoverable information,[28] its admissibility has also become a hot topic of discussion.[29] The basic model for the admissibility of ESI comes from *Lorraine v. Markel American Insurance Company*[30] and considers five factors drawn from traditional evidentiary principles.[31] First, the ESI must tend "to make some fact that is of consequence to the litigation more or less probable than it would be

[19] *See, e.g.*, James Condos, William H. Sorrell, and Susan L. Donegan, BLOCKCHAIN TECHNOLOGY: OPPORTUNITIES AND RISKS 19 (Vermont 2016), *archived at* https://perma.cc/9TKH-V4KN; Oscar Williams-Grut, *Goldman Sachs: 5 Practical Uses for Blockchain-From Airbnb to Stock Markets*, BUS. INSIDER (May 28, 2016), *archived at* https://perma.cc/B7ZY-Y36X.

[20] *See, e.g.*, Amr Refaat, *How the UAE Is Empowering Its Citizens Through Blockchain*, BLOCKCHAIN PULSE: IBM BLOCKCHAIN BLOG (Oct. 30, 2018), *archived at* https://perma.cc/K2S2-MER7.

[21] *See, e.g.,* Linda Rosencrance, *With Blockchain Asset Tracking, Walmart Pushes Supplier Tech Adoption*, SEARCHERP (Nov. 9, 2018), *archived at* https://perma.cc/3ZNN-AJYS.

[22] *See, e.g.*, Christine Kim, *Sweden's Land Registry Demos Live Transaction on a Blockchain*, COINDESK (June 15, 2018), *archived at* https://perma.cc/U9KA-PHBL.

[23] Tsui S. Ng, *Blockchain and Beyond: Smart Contracts*, AMERICAN BAR ASSOCIATION (September 28, 2017), *archived at* https://perma.cc/7EW3-P5FL.

[24] *Id.*

[25] *See, e.g.*, Knut Alicke et al., BLOCKCHAIN TECHNOLOGY FOR SUPPLY CHAINS: A MUST OR A MAYBE? 4 (McKinsey 2017).

[26] At least, above-board business.

[27] James Ching, *Is Blockchain Evidence Inadmissible Hearsay?*, LAW.COM (Jan. 7, 2016), *available at* https://www.law.com/sites/jamesching/2016/01/07/is-blockchain-evidence-inadmissible-hearsay/?slreturn=20200229201705.

[28] *See* FED. R. CIV. P. 34.

[29] *See, e.g.*, Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972 (2017).

[30] 241 F.R.D. 534 (D. Md. 2007).

[31] *Id.*

otherwise."[32] Second, its "probative value" must not be "substantially outweighed by the danger of unfair prejudice."[33] Third, the proponent must authenticate the ESI by "mak[ing] a prima facie showing that it is what he or she claims it to be."[34] Fourth, "an original or duplicate original" is generally required "to prove the contents."[35] Lastly, ESI must be excluded if it constitutes inadmissible hearsay.[36]

The relevance and risk of prejudice associated with a given piece of blockchain evidence is highly specific. This Essay focuses on the issues categorically applicable to blockchain evidence under the Federal Rules of Evidence (FRE). Part I discusses how blockchain receipts can be authenticated. Part II applies the requirement of original writings to blockchain records. Part III discusses the most significant obstacle to the admissibility of blockchain: the rule against hearsay. Finally, Part IV examines state and federal statutes relevant to the legal status of blockchain as evidence.

III. HEARSAY

Hearsay is a person's out-of-court statement, "intended … as an assertion" and "offer[ed] in evidence to prove the truth of the matter asserted."[37] In general, hearsay is considered unreliable—because the adversarial system is unavailable to test the declarant's sincerity, perception, memory, and narration—and is therefore inadmissible.[38] Blockchain records are always made out of court. When a blockchain receipt is used to assert a fact contained therein, the question whether it constitutes hearsay turns on whether it is a "statement" for the purposes of

[32] *Id.* at 538 (citing FED. R. EVID. 401).
[33] *Lorraine*, 241 F.R.D. at 583 (citing FED. R. EVID. 403).
[34] *Id.* at 542 (citing FED. R. EVID. 901–902).
[35] *Id.* at 576 (citing FED. R. EVID. 1001–1008).
[36] *Id.* at 562 (citing FED. R. EVID. 801–807).
[37] FED. R. EVID. 801; *see also* FED. R. EVID. 802.
[38] Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495, 499 (1987).

the FRE. This Part argues it does, but that it is also likely to fall under one of the exceptions to the rule against hearsay.

A. Machine Evidence and *Lizarraga-Tirado*

Previously, courts have, as a rule, treated computer-generated records as hearsay.[39] More recently, scholars and some courts have argued that only statements made by a *person* can be considered hearsay under the FRE, and so machine statements fall outside the Rules' scope.[40] Machines are not, however, infallible envoys of the objective truth. Machine conveyances may be erroneous or misleading as a consequence of what Professor Andrea Roth terms "black box" dangers, issues analogous to traditional concerns with hearsay.[41] The falsehood could arise by design, either through direct intervention by a human operator (think Dieselgate[42]) or without (e.g., machine learning).[43] Like human witnesses, machines may be inarticulate if malfunction or user error give rise to ambiguities or mistaken inferences.[44] Analytical errors can result from programming mistakes,[45] faulty training data,[46] and degradation or environmental factors.[47]

[39] Adam Wolfson, *"Electronic Fingerprints": Doing Away with the Conception of Computer-Generated Records as Hearsay*, 104 U. MICH. L. REV. 151, 159–60 (collecting cases). *See also Perma Research & Dev. v. Singer Co.*, 542 F.2d 111 (2d Cir. 1976) (Van Graafeiland, J., dissenting); Jerome Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. CHI. L. REV. 254, 272 (1974) ("[C]omputer-generated evidence will inevitably be hearsay.").

[40] *See, e.g.*, Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1525–33 (2013) (arguing algorithmic outputs are tools, not speech); *State v. Armstead*, 432 So. 2d 837 at 839–40 (La. 1983) (concluding computer-generated records are not hearsay because they do not depend on "observations and reporting of a human"); Wolfson, *supra* note 40, at 160–61 (arguing humans are the true declarant of any machine conveyance).

[41] *See* Roth, *supra* note 30, at 1977 n.18.

[42] In a 2015 scandal, the U.S. Environmental Protection Agency caught Volkswagen cheating on emissions tests to market its diesel cars' low emissions. Engineers designed software that could detect when the cars were being tested and temporarily change their performance to improve results, concealing emissions up to 40 times the limit. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), *archived at* https://perma.cc/349G-F77G.

[43] Roth, *supra* note 30, at 1990–91.

[44] *Id.* at 1993.

[45] *Id.* at 1994–97.

[46] *Id.* at 1997–98.

[47] Roth, *supra* note 30, at 1999–2000.

Another complexity is that some types of machine testimony rely on distributed cognition. That is, cognitive tasks are performed in part by human experts and in part by machines. In one form of human-technology interaction, the user offloads cognitive operations onto a supporting technology, such as by using a calculator for arithmetic. The result is an efficiency gain, not a qualitative transformation in the human's capabilities.[48] Toward the opposite end, the technology plays the more meaningful role, as in blood alcohol testing. Responsible for calibrating and maintaining the device, the operator retains limited control, but the important judgments are ultimately the province of the device.[49] In the middle, human and technology each make significant contributions of which the other, acting alone, is incapable. For example, in fingerprint matching or clinical diagnoses based on X-rays, cognitive tasks are divided between the human expert and the machine.[50]

The key inquiry is whether the true declarant of a given statement is human or machine. The leading case, *United States v. Lizarraga-Tirado*,[51] illustrates the difference. In 2003, two Border Patrol agents arrested Paciano Lizarraga-Tirado, a previously removed Mexican citizen, for illegal reentry.[52] In support of the agents' testimony that they arrested Lizarraga-Tirado north of the border, the government submitted a Google Earth satellite image and the GPS coordinates of the place of the arrest, which Lizarraga-Tirado challenged on hearsay grounds.[53] The Ninth Circuit held that the satellite image was not hearsay, because it recorded "a snapshot of the world as it existed when the satellite passed overhead," and "ma[de] no assertion."[54] The closer question

[48] Itiel E. Dror & Jennifer L. Mnookin, *The Use of Technology in Human Expert Domains: Challenges and Risks Arising from the Use of Automated Fingerprint Identification Systems in Forensic Science*, 9 LAW, PROB. & RISK 47, 48 (2010).

[49] *Id.* at 48–49.

[50] *Id.* at 48.

[51] 780 F.3d 1107 (9th Cir. 2015).

[52] *Id.* at 1108.

[53] *Id.*

[54] *Id.* at 1109 (citing *United States v. May*, 622 F.2d 1000 (9th Cir. 1980)).

concerned the GPS coordinates and the digital "tack" that Google Earth automatically generated[55] to mark those coordinates.[56] The court ultimately concluded that they were not hearsay, because "the relevant assertion [was] made by the Google Earth program … without any human intervention."[57]

Unlike satellite images and GPS coordinates, blockchain receipts do rely on input from humans; the question is one of degree. Records are entered not directly by human users, but "automatically through a constantly-updating algorithm on every computer in the blockchain network."[58] On the other hand, humans exert meaningful control: after all, the blockchain does not reflect *objective* truth, per se, but rather the consensus of a network of *people*.[59] Thus, the relevant declarant of blockchain evidence is best understood as not the blockchain itself but the human user, placing the evidence within the sphere of hearsay.

This conclusion seems contrary to the policy of the hearsay rule, considering the reliability of blockchain's design. Even relatively robust attempts to tamper with a blockchain are almost certain to be overridden by the algorithm.[60] But the features of blockchain map onto the black box dangers of machine testimony in general. Most obviously, in the case of a 51 percent attack, a blockchain will report intentional falsehoods. In addition, consensus protocols are somewhat complicated, sometimes leading to events, such as forks, that may be susceptible to misinterpretation by lay judges and juries. Nevertheless, blockchain evidence is probably admissible, in most cases, under one of the exceptions to the hearsay rule.

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[55] By looking up the coordinates on Google Earth, the court took judicial notice of the fact that the tack was automatically generated by the program, rather than placed manually by a user. *Lizarraga-Tirado*, 780 F.3d 1107 at 1109.

[56] *Id.*

[57] *Id.* at 1110.

[58] Angela Guo, *Blockchain Receipts: Patentability and Admissibility in Court*, 16 CHI.-KENT J. INTELL. PROP. 440, 446–47 (2016).

[59] Indeed, in the case of a 51 percent attack, the attacker can impose its preferred version of the truth on the system. *See* Narayanan et al., *supra* note 11, at 159–60.

[60] Guo, *supra* note 59, at 447.

B. The Business Records Exception

The FRE carve out an exception to the inadmissibility of hearsay for records "made at or near the time by … someone with knowledge" and "kept in the course of a regularly conducted activity of a business [as] a regular practice of that activity."[61] The rule recognizes the unusual reliability of business records, which are systematically monitored and regularly used, therefore largely avoiding the problems associated with hearsay.[62] First, the source of the recorded information is verified, because the participants responsible for creating and maintaining the records act routinely, under a duty of accuracy, and with reliance on the result. Second, the records are typically factual.[63] Third, participants are routinely involved in the matters recorded and motivated to represent them accurately. As a result, the FRE's language emphasizes routineness and repetitiveness, defining "business" expansively.[64]

Information recorded on a blockchain falls within both the language and intent of the business records exception. Fundamentally, a blockchain is just a digital ledger, which fits comfortably under the FRE's inclusive conception of "record." In the context of supply chains and smart contracts, the production of blockchain receipts is an axiomatic example of "record-keeping in the ordinary course of business."

In the case of cryptocurrency, one commentator has distinguished between the parties involved in the business activities (the transacting users) and those responsible for recording them on the blockchain (the miners).[65] But nothing in the FRE requires that the same entity both maintain the record and conduct the recorded activity. Indeed, the value of a cryptocurrency, and

[61] FED. R. EVID. 803(6)(a)–(c).

[62] FED. R. EVID. 803 advisory committee's note.

[63] To be sure, some business records necessarily contain matters of judgment—take medical records, for example. By contrast, blockchain almost never involves subjectivity.

[64] *Id.*

[65] J. Collin Spring, Note, *The Blockchain Paradox: Almost Always Reliable, Almost Never Admissible*, 72 S.M.U. L. REV. 925, 941 (2019).

therefore the miners' payoff, depends crucially on the blockchain's reliability. Moreover, with the rise of mining pools, mining activities are undeniably routine and repetitive. Solo miners are vanishingly rare, and mining pools, which offer regular employment and income, are responsible for the vast majority of mining.[66] Mining itself—independent of the transactions it executes—has developed into "a regularly conducted activity of a business" within the meaning of the business records exception.

C. The Residual Exception

The residual exception[67] may provide an alternative—albeit more tenuous—avenue for admissibility. Evidence that is not admissible under a specifically recognized exception to the rule against hearsay qualifies for the residual exception if it is (1) "supported by sufficient guarantees of trustworthiness," and (2) "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."[68] An uncompromised blockchain is extremely trustworthy, owing to the consensus mechanism and incentive structure. Where it is the definitive means of tracking transactions or executing a contract, a blockchain would be the most probative evidence available.

The major problem with applying the residual exception to blockchain lies in legislative history: the exception "has never been used … as a repeated backdoor for an entire class of evidence."[69] But originally, the FRE additionally required the proponent to show the evidence was "material" and "admitting it [would] best serve … the interests of justice."[70] Stripping away these requirements, the 2019 amendments demonstrate an intent to expand the scope of the residual

[66] *See supra* note 14.
[67] FED. R. EVID. 807.
[68] FED. R. EVID. 807(a).
[69] Spring, *supra* note 66, at 943 (footnotes and internal quotations omitted).
[70] FED. R. EVID. 807 advisory committee's notes—2019 amendments.

exception, and perhaps a willingness to apply it to previously unanticipated categories of evidence. Blockchain might well fit within this purpose.

Conclusion

Once a libertarian tech bro fever dream, blockchain has found enduring footing in dynamic business, technology, and governance applications. As the industry presence of blockchain technology grows, unresolved questions surrounding its legal status become increasingly salient as well. Blockchain must be able to stand up in court to have any value as a recordkeeping system. But to be admissible at trial, data stored on or generated by a blockchain, as with other forms of electronic information, must adhere to traditional principles that ensure the reliability and utility of evidence. As they currently stand, evidentiary rules can accommodate the use of blockchain as evidence in federal court, although some ambiguity remains. The current trend is for states to enact legislation breaking down the barriers to blockchain's popular acceptance and business utility. While most states remain in the early stages of research and development, this expansion of blockchain's legal status thus far passes constitutional muster while leaving significant potential for further experimentation.

Applicant Details

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Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Competition**

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February 9, 2022

The Hon. John D. Bates
U.S. District Court for the District of Columbia
333 Constitution Avenue, Northwest
Washington, DC 20001

Dear Judge Bates,

I am an alumnus of the George Washington University Law School and currently in my second year of a clerkship at the District of Columbia Superior Court. I write to apply for a clerkship with your chambers beginning August 30, 2022.

I was raised in the military and was the first person in my family to graduate from college. My interest in law school came after working for two litigation practices. During law school, I interned for two federal judges. After working closely with judicial clerks, I resolved to become one myself.

Now, as a judicial clerk at the Superior Court, I am tasked with research and writing every day. My current position is particularly relevant to a clerkship with your chambers as a Rules Clerk, as I regularly apply precedent on the Federal Rules of Civil Procedure. I have written extensively on important federal authority, including the *Daubert* trilogy. The Superior Court Civil Rules largely mirror the Federal Rules, and the District of Columbia Court of Appeals has explicitly adopted many standards of evidence from federal courts. As a consequence, I am fluent in many tentpole legal doctrines that your chambers will undoubtedly be confronted with.

Included in my application you will find a resume, transcripts, and a writing sample. Thank you for your consideration.

Respectfully,

Dustin Wyrick

Dustin Curtis Wyrick

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The George Washington University Law School — **Washington, D.C.**
J.D. | 3.617 | Thurgood Marshall Scholar, top 16-35% each graded semester — May 2020

Activities: *The George Washington International Law Review*, Associate; Mock Trial Board, Member; SBA, Vice President of Student Affairs, 2019 - 2020 (Student Affairs initiatives won the ABA Henry J. Ramsey, Jr. Diversity Award)
Family Law Pro Bono Project, Volunteer (legal aid clinic at the D.C. Superior Courthouse)
Competitions: 2018 Cohen & Cohen (Finalist), 2018 1L (Quarterfinalist)
Writing: Note, *Baking with Blockchain: The Recipe for a National Cryptocurrency*, 52 Geo. Wash. Int'l L. Rev. (Online) (2020)

Towson University — **Towson, MD**
B.S. in Political Science — May 2015

EXPERIENCE

District of Columbia Superior Court — **Washington, D.C.**
The Honorable Alfred S. Irving, Jr. | Law Clerk — Sept. 2020 - Present

- Judge Irving is on the court's Civil I calendar; our caseload is comprised of the court's oldest cases
- Research and write on substantive law, including defamation, medical and legal malpractice, wage and hour, probate, tax, toxic tort including asbestos, property, and contract
- Apply federal precedent on civil procedure and evidence, as the Superior Court Civil Rules largely mirror the Federal Rules of Civil Procedure, and the court borrows much evidence law from federal case law
- Research and write orders for discovery and procedural issues; common issues include Rule 16 Motions, Rule 26(a)(2) Expert Disclosures, Rule 30(b)(6) Motions, and Rule 34 and 37 Motions
- Research and write orders for dispositive motions, including under Rule 12(b), Rule 50, and Rule 56
- Research bench memoranda for status and motions hearings, pretrial conferences, and trials

U.S. District Court for the Eastern District of Virginia — **Alexandria, VA**
The Honorable Rossie D. Alston, Jr. | Judicial Intern — Jan. 2020 - June 2020

- Researched and drafted orders resolving issues of habeas corpus, education discrimination, and discovery
- Wrote bench memoranda for criminal and civil cases; presented and discussed law with clerks and Judge

U.S. District Court for the District of Columbia — **Washington, D.C.**
The Honorable Robin M. Meriweather | Judicial Intern — Sept. 2019 - Nov. 2019

- Researched and drafted orders resolving issues of jurisdiction, discovery, social security, and arbitration
- Wrote bench memoranda for civil cases; presented and discussed law with clerks and Judge

Freedom Technologies, Inc. — **Rosslyn, VA**
Legal Associate — May 2018 - Nov. 2019

- Researched and wrote comments on rulemakings before the Federal Communications Commission
- Led, attended, and presented work product at client meetings with government and private sector clients
- Supervised three associates, managed team workload and assignments, reviewed and edited work product
- Summarized legislative, administrative, and international policy developments, compiled data for analysis

Venable LLP — **Baltimore, MD**
Government Litigation Practice Group | Practice Group Assistant — Feb. 2016 - June 2017

- Researched and briefed cases, Chief Research Assistant for *Maryland Employment Law*, a legal treatise
- Edited and reviewed pleadings and contracts, provided edits and suggestions to attorneys
- Conducted document review for discovery and managed discovery files for a diverse body of large cases
- Supported significant cases including a historic municipal environmental consent decree and class-actions

BAR ADMISSIONS & QUALIFICATIONS

Bars: District of Columbia | Maryland
Clearance: Eligibility for Secret determined on December 12, 2019
Past Work: Professional children's entertainer | Furniture repair | Performing guitarist, pianist, drummer

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G39180985
Date of Birth: 13-OCT

Date Issued: 21-JUN-2020

Record of: Dustin C Wyrick

Page: 1

Student Level: Law
Admit Term: Fall 2017

Issued To: DUSTIN WYRICK
2401 H ST NW APT 515
WASHINGTON, DC 20037-2579

REFNUM:31129013

Current College(s):Law School
Current Major(s): Law

Degree Awarded: J D 17-MAY-2020
With Honors
Major: Law

EXPERIENTIAL REQUIREMENT MET
WRITING REQUIREMENT MET (6659)
JD RANK: 85/407

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2017			
	Law School		
	Law		
LAW 6202	Contracts I Gabaldon	3.00	B+
LAW 6206	Torts Schoenbaum	4.00	B+
LAW 6210	Criminal Law Pustilnik	3.00	A
LAW 6212	Civil Procedure I Peterson	3.00	A
LAW 6216	Legal Research And Writing Myers-Mutschall	2.00	B+
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.600		
	CUM 15.00 GPA-Hrs 15.00 GPA 3.600		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16% - 35% OF THE CLASS TO DATE		
Spring 2018			
	Law School		
	Law		
LAW 6203	Contracts II Fairfax	3.00	B+
LAW 6208	Property Kieff	4.00	B+
LAW 6213	Civil Procedure II Siegel	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	B+
LAW 6217	Introduction To Advocacy Rohrs	2.00	B+
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.467		
	CUM 30.00 GPA-Hrs 30.00 GPA 3.533		
	Good Standing		
	DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16% - 35% OF THE CLASS TO DATE		

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2018			
LAW 6230	Evidence Braman	3.00	A
LAW 6250	Corporations Fairfax	4.00	A
LAW 6570	Int'L Human Rights Of Women Celorio	2.00	B+
LAW 6645	Mock Trial Comp-Cohen & Cohen Johnson	1.00	CR
LAW 6657	Int'L Law Review Note	1.00	P
LAW 6869	Selected Topics In Nat'L Sec Rosenzweig	2.00	B+
	Ehrs 13.00 GPA-Hrs 11.00 GPA 3.758		
	CUM 43.00 GPA-Hrs 41.00 GPA 3.593		
	Good Standing		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16%-35% OF THE CLASS TO DATE		
Spring 2019			
LAW 6236	Complex Litigation Trangsrud	3.00	B+
LAW 6300	Federal Income Tax Brown	3.00	A-
LAW 6426	Public Law Seminar Goodfriend	2.00	A-
LAW 6657	Int'L Law Review Note	1.00	P
LAW 6869	Selected Topics In Nat'L Sec Abdelhady	2.00	A-
LAW 6877	Nuclear Nonprolif Law & Policy Jonas	2.00	A
	Ehrs 13.00 GPA-Hrs 12.00 GPA 3.639		
	CUM 56.00 GPA-Hrs 53.00 GPA 3.604		
	Good Standing		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16%-35% OF THE CLASS TO DATE		

********** CONTINUED ON PAGE 2 **********

Ed Edmondson
University Registrar

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G39180985
Date of Birth: 13-OCT

Date Issued: 21-JUN-2020

Record of: Dustin C Wyrick

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2019			
LAW 6232	Federal Courts Stucky	3.00	CR
LAW 6595	Race, Racism, And American Law Overton	2.00	B+
LAW 6640	Trial Advocacy Sulton	3.00	A
LAW 6641	External Comp - Mock Trial Johnson	1.00	CR
LAW 6659	International Law Review	1.00	CR
LAW 6668	Field Placement Tillipman	2.00	CR
LAW 6669	The Craft Of Judging Greene	2.00	A-
Ehrs 14.00 GPA-Hrs 7.00 GPA 3.714			
CUM 70.00 GPA-Hrs 60.00 GPA 3.617			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Spring 2020			
LAW 6218	Professional Responslbty/Ethic	2.00	CR
LAW 6268	Employment Law	3.00	CR
LAW 6284	Creditor Rights/Debtor Protect	3.00	CR
LAW 6360	Criminal Procedure	3.00	CR
LAW 6641	External Comp - Mock Trial	1.00	CR
LAW 6659	International Law Review	1.00	CR
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	2.00	CR
Ehrs 15.00 GPA-Hrs 0.00 GPA 0.000			
CUM 85.00 GPA-Hrs 60.00 GPA 3.617			
...			
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	85.00	60.00	217.00	3.617
OVERALL	85.00	60.00	217.00	3.617

########## END OF DOCUMENT ##########

Ed Edmundson
University Registrar

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JESUS VILLA LEON, *et al.*, Plaintiff, v. OCEANPRO INDUSTRIES, LTD., *et al.*, Defendants.	2017 CA 005597 B Judge Alfred S. Irving, Jr.

ORDER

Before the Court is *Plaintiffs' Motion to Compel Paychex to Retake the 30(b)(6) Deposition and Pay Sanctions*, filed November 17, 2020 ("Motion to Compel Second Deposition"), and the accompanying opposition and response.

Plaintiffs requested a Superior Court Civil Rule 30(b)(6) deposition of Paychex, Inc., Paychex North America, Inc., and Paychex Business Solutions, LLC (collectively "Paychex"). Plaintiffs allege that Paychex's deposition testimony was deficient for several reasons, and request that the Court order a second deposition. Pursuant to these requests, Plaintiffs ask for sanctions, a finding of contempt, an award of attorney's fees and costs associated with Paychex's obstructive discovery activity, and various reparative actions.

BACKGROUND

Plaintiffs are a class of employees and former employees for Defendant OceanPro Industries, Ltd. ("OceanPro"). Paychex is a collection of business entities that provided payroll management services to OceanPro during the relevant period for the Plaintiffs' wage claims. Plaintiffs served Paychex with a subpoena and notices of record depositions on February 6, 2020. Plaintiffs have filed a number of discovery motions against Paychex, including a motion to compel a Rule 30(b)(6) deposition. On July 9, 2020, Paychex filed a Motion to Quash.

Specifically, Paychex contested the Fifth Amended Subpoena Duces Tecum and Notice of Deposition, served on June 24, 2020 ("Fifth Amended Subpoena").

On August 25, 2020, the Hon. William M. Jackson granted Plaintiffs' Motion to Compel and denied Paychex's Motion to Quash. Judge Jackson ordered that Paychex "produce all of the documents enumerated in [the Fifth Amended Subpoena] by September 15, 2020." Order at 2. Further, Judge Jackson ordered Paychex to submit to a Rule 30(b)(6) deposition within 21 days after Paychex produced such documents.

Now, Plaintiffs claim that, while Paychex has submitted to a deposition pursuant to Rule 30(b)(6), Plaintiffs argue that Paychex's designated witness was not adequately prepared.

DISCUSSION

I. Plaintiffs' Request to Retake the 30(b)(6) Deposition.

Judge Jackson's August 25, 2020 Order directed Paychex to submit to a Superior Court Civil Rule 30(b)(6) deposition, no later than 21 days after production of the documents enumerated in Plaintiffs' Fifth Subpoena. Plaintiffs and Paychex held a deposition on October 6, 2020. Paychex selected Adam Cory Walton, "an internal support representative for the Time and Attendance product[.]" to serve as their designated witness. Walton Aff., ¶ 1. Plaintiffs argue that Paychex failed to adequately prepare Mr. Walton for the deposition, explaining that Mr. Walton was prepped for only about three hours, reviewed very few documents that would be discussed at the deposition, and inaccurately limited the scope of such preparation. Plaintiffs ask the Court to find the lack of preparation exhibited by Paychex to be the equivalent of failing to appear for the deposition.

Superior Court Civil Rule 30(b)(6) provides that:

> In its notice or subpoena, a party may name as the deponent a public or private corporation . . . The named organization must then designate one or more officers, directors, or managing agents, or

> designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . The persons designated must testify about information known or reasonably available to the organization.

Federal courts applying the federal equivalent of this Rule place a duty on the corporation to produce a deponent that will be knowledgeable on the topics set for questioning and will be responsible for presenting the corporation's position on those topics. *United States ex rel. Barko v. Halliburton Co.*, Case No. 1:05-CV-1276, 2015 U.S. Dist. LEXIS 197786, at *6-*9 (D.D.C. Jan. 10, 2015); *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 538-39 (D. Nev. 2008); *Alexander v. FBI*, 186 F.R.D. 137, 140-41 (D.D.C. 1998). "The duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved." *Barko*, 2015 U.S. Dist. LEXIS 197786, at *7.

The United States District Court for the Southern District of Florida collected a useful list of tenets for the federal Rule 30(b)(6) in *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 687-691 (S.D. Fla. 2012). Principles relevant for the purposes of this proceeding include: (i) the failure to properly designate and prepare a witness can be deemed a nonappearance justifying sanctions and costs, (ii) when a witness legitimately cannot answer relevant questions, and the corporation cannot better prepare the witness or provide a substitute, a response indicating the corporation's lack of knowledge can be binding, (iii) a corporation must designate multiple deponents if doing so is necessary to respond to questions in full, (iv) the corporation has a duty to make a good faith, conscientious effort to designate appropriate persons and to prepare them to testify fully and non-evasively about the subjects, (v) a corporation with no current knowledgeable employees must prepare designees through the review of materials, including discovery materials, (vi) the corporation is expected to "create" an appropriate witness or

witnesses if necessary, including with a review of information reasonably available to the corporation, (vii) a designee need not personally review all information available, but, the designee must be prepared to provide binding answers under oath, (viii) preparing a witness to this end may be burdensome, but the burden is a consequence of the privilege of incorporation, (ix) absolute perfection is not required of a designated witness, the mere fact that a designee could not answer every question on a certain topic does not mean a failure to comply with the rule, and (x) if a corporation expects a witness to be unprepared to testify on a particular topic, as much should be disclosed to the deposing party prior to the deposition. *Id.* (listing 39 principles guiding the expectations of Fed. R. Civ. P. 30(b)(6)).

Paychex is correct that Mr. Walton is qualified to serve as at least one of their Rule 30(b)(6) witnesses, and that Mr. Walton need not have reviewed every single discovery document prior to the deposition. Further, it is acceptable for a corporate deponent to, in some circumstances, testify to a lack of knowledge. As Paychex argues, it was prudent to produce a subject-matter expert on the payroll program that OceanPro used. Indeed, Mr. Walton discussed Paychex's timekeeping software at length. However, choosing and preparing a Rule 30(b)(6) witness requires more than the effort that Paychex expended. Several moments from Mr. Walton's testimony are revealing of Paychex's failure to adequately produce a witness. For example, when asked how Paychex prepared him for deposition on the matters in the subpoena, Mr. Walton succinctly testified that "[t]hey provided the subpoena to me to look over the items that were going to be required." Walton Aff., Ex. A, at 20.

Plaintiffs' counsel later asked, "Is it possible in any way that a manager made an edit, modification, alteration, shortening of hours that was not captured or preserved by Paychex?" Mr. Walton replied, "If it was done through the web portal, then no. The only option I can say

yes to is if they have the ability to change that on – at the clock, but I can't confirm that they have that option." Plaintiffs' counsel then asked, "Would somebody form the TLO department be able to confirm that option?" Mr. Walton replied, "Yes." *Id.* at 223-24. Mr. Walton further said: "I was not part of the initial conversation that would have happened with the client to set up the initial site, and at the same time I was not a part or we do not have a record of what the client may have done to the site after the initial setup was done." Plaintiffs' counsel asked, "Did Paychex make available to you the person who was involved in the initial setup so that you could prepare for today's testimony?" Mr. Walton answered "No." *Id.*

Mr. Walton's gaps in knowledge about Paychex's relationship with OceanPro exposes that he was insufficiently prepared to serve as Paychex's Rule 30(b)(6) deponent. *See, e.g.*, *id.* at 60-61 (unaware of products purchased by OceanPro), 258 (unaware of whether Paychex employees that assisted OceanPro early in their business relationship were still employed by Paychex). Plaintiffs are entitled to more granular insight into OceanPro's use of Paychex products. It may be that Paychex no longer has records of some of the information that Plaintiffs seek, but, at bottom, Paychex's duty under Rule 30(b)(6) is to discern with certainty what information is and is not available. Then, Paychex must commit to their findings in a deposition, under oath.

Paychex had from Judge Jackson's August 25, 2020 Order to prepare a witness to testify on its behalf. Mr. Walton was informed "roughly a week and a half" before the deposition that he would be Paychex's Rule 30(b)(6) deponent, and apparently spent three hours reviewing materials in preparation. *Id.* at 33. There is no absolute number of hours that must be spent in preparation that would satisfy Rule 30(b)(6). However, some federal courts have suggested that the duty of the subject of a Rule 30(b)(6) deposition is a "conscientious good-faith endeavor" to

deliver a witness to "answer fully, completely, and unevasively, the questions posed." *Wilson v. Lakner*, 228 F.R.D. 524, 528-89 (D. Md. 2005) (citing *Mitsui & Co. v. Puerto Rico Water Res. Auth.*, 93 F.R.D. 62, 67 (D.P.R. 1981)). The Court is not satisfied that Paychex has risen to this standard.

Paychex argues that Plaintiffs' demand for a new deposition on all 37 topics of examination is overbroad. The Court agrees. Mr. Walton testified for seven hours, and in those areas where he provided knowledgeable responses, his testimony should suffice. Mr. Walton testified satisfactorily as to matters relating directly to the use of Paychex software, and standard practices for those who use it. However, the deposition transcript is devoid of many other key areas of inquiry. The Court must therefore afford Plaintiffs an opportunity to further question Paychex in a second Rule 30(b)(6) deposition.

As a brief aside, Plaintiffs argue that Paychex's counsel could not assert attorney-client privilege during Mr. Walton's deposition because Mr. Walton had no representation agreement with counsel. Plaintiffs cite to no authority supporting their notion. A legitimate question may be found in whether a corporation can elude disclosing certain information to their own Rule 30(b)(6) deponent by way of privilege, or whether certain facts disclosed to an attorney may be hidden by way of privilege, *see Barko*, 2015 U.S. Dist. LEXIS 197786, at *6, but those questions are not at issue, here. Plaintiffs ask Paychex to testify through Mr. Walton without the protection of attorney-client privilege. Plaintiffs provide no authority to strip Paychex of the privilege. The Court is not persuaded that a Rule 30(b)(6) designee is not permitted attorney-client privilege simply because the designee has no representation agreement with their employer's counsel.

II. Plaintiffs' Request for Attorney's Fees and Costs.

Plaintiffs ask the Court to impose sanctions for Paychex's failure to provide a prepared deponent, and to find, in essence, that Paychex did not "appear" as expected by the Court's Rules and the August 25, 2020 Order. Superior Court Civil Rule 30(d)(2) provides that "[t]he court may impose an appropriate sanction -- including the reasonable expenses and attorney's fees incurred by any party -- on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 37(d)(1)(a)(i) provides that the court may order sanctions if a person designated under Rule 30(b)(6) fails to appear, although, Rule 37(d) is specifically entitled "*Party's* failure to attend its own deposition[,]" and arguably does not apply to non-parties (emphasis added). The Court considers the analysis relevant, however, for the general proposition that a corporate entity may be sanctioned for failing to produce a Rule 30(b)(6) deponent. Federal courts have found that a corporate entity who fails to offer a prepared witness has failed its obligation under the federal equivalent. *Pioneer Drive, LLC v. Nissan Diesel Am., Inc.*, 262 F.R.D. 552, 559-61 (D. Mont. 2009).

Most relevant, however, is that Paychex was under court order to appear for a deposition. Rule 37(b)(1) provides that "[i]f the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court." Further, the trial court is afforded broad discretion in determining what sanctions to apply for noncompliance with pretrial discovery orders and the discovery rules. *See Lowrey*, 908 A.2d at 34; *In re Estate of Gray*, 834 A.2d 859, 860 (D.C. 2003).

The Court has found that Paychex failed to produce a deponent pursuant to Rule 30(b)(6). This amounts to failing to appear for the deposition. *See QBE Ins. Corp.*, 277 F.R.D. at 687. Paychex is directed to pay Plaintiffs reasonable attorney's fees and costs associated with filing

the November 17, 2020 Motion to Compel Second Deposition. However, Plaintiffs' separate request for sanctions related a late production of documents is not granted; fees and costs must demonstrably be the result of requesting a second deposition. Further, Paychex must pay Plaintiffs reasonable attorney's fees and costs associated with conducting the second Rule 30(b)(6) deposition pursuant to this Order. Plaintiffs are ordered to submit a statement of fees and costs incurred as a result of Paychex's failure to provide an adequate Rule 30(b)(6) witness.

ACCORDINGLY, it is by the Court this 7th day of April 2021, hereby

ORDERED that Plaintiffs' Motion to Compel Paychex to Retake the 30(b)(6) Deposition and Pay Sanctions is **GRANTED**; and it is further

ORDERED that Paychex will submit to a second Rule 30(b)(6) deposition, limited to the Matters of Examination in Plaintiffs' Fifth Amended Subpoena that were not addressed at the October 6, 2020 deposition, within 21 days of this Order; and it is further

ORDERED that Plaintiffs will file a statement of reasonable fees and costs associated with Paychex's failure to provide an adequate Rule 30(b)(6) deponent within 21 days of the filing of this Order.

WRITING SAMPLE BY DUSTIN WYRICK

Applicant Details

First Name	**Austin**
Middle Initial	**V**
Last Name	**Yim**
Citizenship Status	**U. S. Citizen**
Email Address	**avy@uchicago.edu**
Address	**Address** Street **4706 Rutland Rd.** City **Valparaiso** State/Territory **Indiana** Zip **46383** Country **United States**
Contact Phone Number	**2195082453**

Applicant Education

BA/BS From	**Amherst College**
Date of BA/BS	**May 2008**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 13, 2020**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Hemel, Daniel
dhemel@uchicago.edu
773-702-9494

Baird, Douglas
dbaird@uchicago.edu

Ginsburg, Thomas
tginsburg@uchicago.edu
773-834-3087

References

Professor Douglas Baird
dbaird@uchicago.edu
773-702-9494

Professor Tom Ginsburg
tginsburg@uchicago.edu
773-702-9494

Professor Daniel Hemel
dhemel@uchicago.edu
773-834-3255

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 15, 2022

The Honorable John D. Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW, Room 4114
Washington, D.C. 20001

Dear Judge Bates:

I am writing to apply to be the Rules Law Clerk assisting you in your role as Chair of the Judicial Conference Committee on Rules of Practice and Procedure. I am a 2020 graduate of the University of Chicago Law School, and I am currently serving as a staff attorney for the United States Court of Appeals for the Sixth Circuit. I would like to take up this clerkship to pursue a legal career with the government or in academia specializing in the federal legislative and administrative rulemaking processes.

Prior to law school, I completed a PhD at the University of Oxford in the foundations of mathematics, where my research included exploring changes to the rules of logical reasoning used by mathematicians and examining the mathematical consequences of those changes. This background drew me to explore the history and development of judicial procedure in law school beyond the required 1L course in civil procedure. For a seminar on the history of corporate reorganizations, I wrote a paper exploring bankruptcy procedure in the early twentieth century, and a seminar on judicial precedent presented an opportunity to write a research paper tracing the evolution of the modern class action in history from before the 1912 promulgation of the Federal Equity Rules to the transformative changes made in 1966 to the original version of Federal Rule of Civil Procedure 23. My writing sample is an excerpt from this paper on class actions.

As a staff attorney, I have worked predominantly on appeals involving pro se litigants, and the disposition of many of my cases have regularly depended on the correct interpretation and application of a procedure rule created through the judiciary's rulemaking process. I have learned to appreciate the careful interaction of different rules of procedure from the procedural posture of these cases; for example, I had a case involving the appeal of an adversary proceeding in a bankruptcy case where the question of appellate jurisdiction depended on a careful reading of the federal rules of appellate, bankruptcy, and civil procedure. These experiences impress upon me the stakes involved in drafting rules that can accommodate both pro se litigants unable or unwilling to secure legal representation in their personal lawsuits and seasoned lawyers representing corporate clients in cutting-edge complex litigations.

I believe that working as your Rules Law Clerk would be an ideal next step in my legal career that can address gaps in my current legal training and position myself for a career in our nation's capital. Working with committee staff to fulfill the congressional mandate to continuously study the operation and effect of the federal rules and consider proposed changes to them would afford a rare insider's perspective of the entire rulemaking process. Outreach work would be an opportunity for me to connect with the judges, lawyers, and scholars whose professional interests are affected by the rulemaking process. I also look forward to gaining trial-level experience assisting you in your district court casework.

A resume, a writing sample, and my transcripts are enclosed. I have asked for letters of recommendation to be sent to your chambers through the law school's career services office. I am happy to send additional information or documents; please do not hesitate to let me know. Thank you for your time and consideration of my application.

Sincerely,

Austin V. Yim

Austin Vincent Yim

4706 Rutland Rd. Valparaiso, Indiana 46383 ♦ +1 219-508-2453 ♦ austinvyim@gmail.com

EDUCATION

The University of Chicago Law School (Chicago, IL): Juris Doctor with Honors, June 2020

ACTIVITIES Moot Court Competition Participant (2L, 3L)
Electoral Reform Society: 1L Rep., Treasurer (2L), 3L Rep.
International Law Society: 2L Rep., Secretary (3L)

Yale Divinity School (New Haven, CT): Master of Divinity, May 2017

EXCHANGES Westcott House, Cambridge, Fall 2015
Hebrew University of Jerusalem, August 2015
AWARD Two Brothers Fellowship for Biblical Study
ACTIVITIES Yale Methodist Society; YDS Asian Students Association

Exeter College, University of Oxford (Oxford, England): Doctor of Philosophy in Mathematics, October 2012

THESIS *On Galois Correspondences in Formal Logic*
Supervisor: Prof. Jochen Koenigsmann
ACTIVITIES Exeter College Middle Common Room: Treasurer; Exeter College Chapel: Chapel Clerk

Amherst College (Amherst, MA): Bachelor of Arts *magna cum laude* with Distinction, May 2008

MAJOR Mathematics; Senior Thesis: *Relevance Logic and Relevant Arithmetic*
PRIZES Porter Prize in Astronomy; G.W. Blunt White Prize in American Maritime History
EXCHANGE Maritime Studies Program of Williams College and Mystic Seaport, Spring 2007
ACTIVITIES Student Government: Student Senator, Secretary; Five College Early Music Program: Baroque Violin; Health and Wellness House: President

RECENT EXPERIENCE

U.S. Court of Appeals for the Sixth Circuit (Cincinnati, OH); *Term Staff Attorney*, December 2020-

- Drafted memoranda and proposed dispositions for the court's non-oral argument cases
- Cases primarily included direct criminal appeals, habeas corpus petitions, civil rights actions, and immigration cases
- Extensive experience working remotely

Patterson Law Firm LLC (Chicago, IL): *Summer Law Clerk*, June-July 2019

- Reviewed documents, abstracted depositions, and drafted research memos for plaintiff-side legal malpractice litigations
- Drafted research memos and discovery requests for commercial litigations as requested by the firm's principals
- Completed the research and drafting of a pre-litigation civil demand letter related to an employee compensation dispute

Yoon & Yang LLC (Seoul, South Korea): *Summer Associate*, June-August 2018

- Reviewed documents and provided research assistance pertaining to an SIAC arbitration between a Korean energy company and a Malaysian supplier
- Reviewed documents and expert testimony pertaining to a CISG-based HKIAC arbitration between a Korean equipment manufacturer and a Chinese energy company
- Assisted in the drafting of official translations of legal and corporate documents from Korean into English
- Drafted a research memo on the potential legal issues for a Korean technology company that was exploring expansion of its business operations into the United States

Yale University Department of Mathematics (New Haven, CT): *Teaching Fellow*, August 2014-May 2017

- Courses: Linear Algebra, Measure Theory and Integration, and Introduction to Functional Analysis
- Duties included grading homework, leading discussion sections, holding office hours, making ongoing student progress reports, and grading exams with the course instructor

MISCELLANEOUS

Elder and Pastor in the Indiana Conference of the United Methodist Church
Pro Bono Service: Louisiana Capital Assistance Center (March 2019), Equip for Equality (November 2018, March 2020)
Ongoing Research Projects Available on Request

Austin Yim
The University of Chicago Law School
Cumulative GPA: 179.000

Autumn 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 30101: Elements of the Law	Geoffrey Stone	178	3	
LAWS 30211: Civil Procedure I	Emily Buss	181	3	
LAWS 30311: Criminal Law	Richard McAdams	181	3	
LAWS 30611: Torts	Daniel Hemel	177	3	
LAWS 30711: Legal Research and Writing	Manisha Padi	183	1	

[Information at the start of the transcript:]
Degrees Awarded
Degree: Doctor of Law
Confer Date: 06/13/2020
Degree GPA: 179.000
Degree Honors: With Honors, J.D. in Law

Academic Program History
Program:
Law School
Start Quarter: Autumn 2017
Current Status: Completed Program
J.D. in Law

External Education
Amherst College
Amherst, Massachusetts
BA 2008

Yale University
New Haven, Connecticut
Master of Divinity 2017

University of Oxford-Exeter College
Oxford, England, United Kingdom
Doctor of Philosophy 2012

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Winter 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 30311: Criminal Law	Genevieve Lakier	181	3	
LAWS 30411: Property	Daniel Abebe	174	3	
LAWS 30511: Contracts	Eric Posner	177	3	
LAWS 30611: Torts	Saul Levmore	177	3	
LAWS 30711: Legal Research and Writing	Manisha Padi	183	1	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 30221: Civil Procedure II	Anthony Casey	182	3	
LAWS 30411: Property	Lior Strahilevitz	174	3	
LAWS 30511: Contracts	Eric Posner	177	3	
LAWS 30712: Lawyering: Brief Writing, Oral Advocacy and Transactional Skills	Manisha Padi	178	2	
LAWS 43201: Comparative Legal Institutions	Thomas Ginsburg	182	3	Meets Substantial Research Paper Requirement

Autumn 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 41101: Federal Courts	Fred Smith	178	3	
LAWS 43219: Law and Society	Anna-Maria Marshall	179	3	
LAWS 45001: Family Law	Kristin Collins	176	3	
LAWS 53310: International Arbitration	Javier Rubinstein	180	3	

Winter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 42801: Antitrust Law	Randal Picker	177	3	
LAWS 53117: History of the Law of Corporate Reorganizations	Douglas Baird	181	3	Meets Writing Project Requirement
LAWS 53282: The Interbellum Constitution: Union, Commerce, and SIvery in the Early 19th Century	Alison LaCroix	181	3	
LAWS 59903: Judicial Federalism	Diane Wood	179	3	
LAWS 90222: Innovation Clinic	Emily Underwood	179	1	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 40501: Constitutional Law V: Freedom of Religion	Mary Anne Case	EP	3	
LAWS 44121: Introductory Income Taxation	Daniel Hemel	182	3	
LAWS 51704: Critical Legal STudies vs. Law and Economics	William Hubbard	179	2	
LAWS 53403: Precedent	William Baude	182	3	

LAWS 90222: Innovation Clinic	Emily Underwood	179	1	

Autumn 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 43224: Admiralty Law	Randall Schmidt	177	3	
LAWS 43265: International Investment Law	Thomas Ginsburg	EP	3	
LAWS 50311: U.S. Supreme Court: Theory and Practice	Sarah Konsky, Michael Scodro	178	3	
LAWS 57013: Canonical Ideas in American Legal Thought	Thomas Miles, Thomas Ginsberg, Aziz Huq	180	3	
LAWS 90222:Innovation Clinic	Emily Underwood	179	1	
LAWS 92000: Greenberg Seminars: Reconciliation in Ireland and South Africa	Martha Nussbaum, William Birdthistle	P	1	

Winter 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 43234: Bankruptcy and Reorganization: The Federal Bankruptcy Code	Douglas Baird	177	3	
LAWS 53101: Legal Profession: Ethics	Hal Morris	183	3	
LAWS 53411: Investment Funds	William Birdthistle	EP	3	
LAWS 57013: Canonical Ideas in American Legal Thought	Thomas Ginsburg, Thomas Miles, Aziz Huq	179	2	
LAWS 90222: Innovation Clinic	Emily Underwood	179	1	
LAWS 92000: Greenberg Seminars: Reconciliation in Ireland and South Africa	William Birdthistle, Martha C. Nussbaum	P	0	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
LAWS 53118: Advanced Topics in Corporate Reorganization	Christopher Sontchi, Douglas Baird	EP	2	
LAWS 53222: Enforcement Risk in Cross-Border Transactions	Asheesh Goel, Kim Nemirow, Nicholas Niles	EP	3	
LAWS 53436: Law and the American Revolution	Farah Peterson	EP	1	

LAWS 57013: Canonical Ideas in American Legal Thought	Thomas Miles, Thomas Ginsburg, Aziz Huq	EP	2
LAWS 90222: Innovation Clinic	Emily Underwood	EP	1
LAWS 92000: Greenberg Seminars: Reconciliation in Ireland and South Africa	William Birdthistle, Martha C. Nussbaum	P	0

Honors/Awards: Completed Pro Bono Service Initiative

Grading System Description

UNIVERSITY OF CHICAGO LAW SCHOOL TRANSCRIPT KEY

For an on-line version of this key and any updates, please consult the web site of the Office of the University Registrar: http://registrar.uchicago.edu/page/law-school-key.

The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

Frequency of Honors in a typical graduating class:

Highest Honors = (182+) .5%

High Honors = (180.5+) (pre-2002 180+) 7.2%

Honors = (179+) (pre-2002 178+) 22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA. EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March 2020 that resulted in school-wide changes to instruction and/or academic policies.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for graduating class Spring 2011)

COVID-19: A global health emergency beginning in March of 2020 required significant changes to coursework. Unusual enrollment patterns and grades reflect the tumult of the time, not necessarily the work of the individual.

See Grading Systems (http://registrar.uchicago.edu/page/grading-systems) for additional Law school grading methods.

Austin Yim
Williams College
Cumulative GPA: 3.84/4

Spring 2007

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Maritime Studies 211: Oceanographic Processes	Gilbert	A		
Maritime Studies 231T: Literature of the Sea	Mentz	A		
Maritime Studies 351: Marine Policy	Robinson Hall	A-		
Maritime Studies 352: America & the Sea, 1600-Present	Gordinier	A-		

*** Williams-Mystic Program ***
Dean's List

Grading System Description
A+ = 4.33
A = 4.00
A- = 3.67
B+ = 3.33
B = 3.00
B- = 2.67
C+ = 2.33
C = 2.00
C- = 1.67
D+ = 1.33
D = 1.00
D- = 0.67
E = 0

Austin Yim
Amherst College
Cumulative GPA: 12.51/14

Fall 2004

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
FYSE 07: Genes/Genomes/ Society	Ratner	A-	4	
French 07: Contempry Lit & Culture	De la Carrerra	A	4	
Geology 11: Principles of Geology	Cheney, Harms	A	4	
Math 13: Multivariable Calculus	Leise	A+	4	

Spring 2005

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Geology 28: Hydrogeology	Martini	A	4	
History 54: Environ Hist: Lat Amer	Lopez	A	4	
LJST 32: Law's Nature	Delaney	A	4	
Religion 45: Christianity-Early Years	Doran	A	4	

Fall 2005

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Economic 54: Microeconomics	Westhoff	A-	4	
English 30: Chaucer: An Introduction	Chickering	A-	4	
Geology 45: Biogeochemistry	Martini	A	4	
Math 21: Linear Algebra	Armacost	A-	4	
Philosophy 35: Theory of Knowledge	Vogel	A-	4	

Spring 2006

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Colloquium 22: The Resilient Earth	Crowley, Dizard	A	4	
History 68: Science/Society Mod Amer	Servos	B+	4	
Math 26: Groups, Rings and Fields	Armacost	B-	4	
Math 28: Intro to Analysis	Starr	B-	4	
Sociology 40: Social Constr of Nature	Dizard	A	4	

Fall 2006

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Astronomy 23: Planetary Science	Burbine	A+	4	
European Studies 21: European Tradition I	Doran	A	4	
History 2: Environmental Hist Intro	Broich	A	4	
Latin 1: Latin Lang and Lit	Damon	A	4	
Math 34: Mathematical Logic	Velleman	A-	4	

Spring 2007

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Transfer Credits Granted:
Williams College
Spring 2007
Oceanographic Processes
Literature of the Sea
Marine Policy
America & the Sea 1600-Present
(Equivalent to four courses)

Fall 2007

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Biology 23: Ecology	Temeles	A-	4	
Geology 30: Mineralogy	Cheney	A+	4	
Math 31: Functns Complex Variable	Starr	A+	4	
Math 77: Senior Honors	Velleman	A		

Spring 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Math 42: Functions Real Variable	Cox	A	4	
Math 78: Senior Honors	Velleman	A	4	
Pick 04: Envrnmntl Risk & Choice	Dizard, Delaney	A	4	
Religion 20: Close Read/ Parbl of Jesus	Doran	A-	4	
Religion 98H: Readings in Hebrew	Doran	P	2	

May 2008: Passed Comprehensive Evaluation in Mathematics

Grading System Description
GPA point system:
A+ = 14
A = 13
A- = 12
B+ = 11
B = 10
B- = 9
C+ = 8
C = 7
C- = 6
D = 4
F = 1

Austin V. Yim

Cover Letter for Writing Sample: An Excerpt from "Precedent and Class Actions"

This writing sample is an excerpt from a paper I wrote for a seminar on Precedent taught by Professor William Baude at the University of Chicago Law School. This seminar, which focused on what is meant by the word "precedent" in American law, explored how individual Supreme Court justices approach precedent and why they care about precedent, compared distinctions between precedents affecting statutory interpretation or the common law versus precedents governing constitutional interpretation, and critiqued various scholarly arguments in favor of or against the use of precedent.

My paper explored precedent's relationship with class actions, starting from the initial observation that the legal consequences of precedential cases and class actions extend beyond the direct participants of the original litigations. After also observing that several milestone precedential cases, such as *Brown v. Board of Education*, began as class actions and that so-called "super-precedents," which are cited by other precedential cases to justify a certain outcome, tend to be broad declarations of law which are then concretely applied by the regular precedents, I proposed that, should the Supreme Court and other courts in the United States find precedent unwieldy enough to reject the doctrine of *stare decisis*, litigants who want to secure legal rights or reliance interests for others could try to use class actions in a strategic manner to mimic the existing system of precedent. An initial class action with a very broad class against a defendant could seek a declaratory judgment that would be binding on that class and that defendant, and then subsequent class actions pursued by subsets of that initial class against the same defendant could use that initial declaratory judgment to pursue other remedies.

In order to support this proposal, I also explored the federal law of class actions and its historical development in the United States. Just as the federal class action today is a creature of Rule 23 of the Federal Rules of Civil Procedure, its direct ancestors, which were first known as representative litigations or suits and later as class suits, were also procedural devices based on the rules issued by the Supreme Court to regulate the federal trial courts that had equitable powers, which were originally the federal circuit courts. In 1842, the Supreme Court introduced a new Rules of Practice for the Courts of Equity of the United States;

Rule XLVIII provided for parties to represent non-participants in a litigation in equity, but "in such cases the decree [arising from such litigation] shall be without prejudice to the rights and claims of all the absent parties." This rule, but without the quoted portion, became Rule 38 of the Federal Equity Rules promulgated in 1912, as part of the broader reforms that abolished federal circuit courts and transferred its equitable powers to the federal district courts. The merger of law and equity necessitated the promulgation of the Federal Rules of Civil Procedure in 1938, with Rule 23 governing what it now called class actions. The current structure of Rule 23 is largely based on substantial revisions passed in 1966 that resulted in the creation of Rule 23.1 and Rule 23.2 from parts of the old Rule 23.

The following excerpt, which is one complete section from my paper, traces case-law developments of pre-Rule 23 representative litigations that reached the Supreme Court in parallel to the rulemaking authority the Court has exercised in the forms of the 1842 Rules of Practice, the 1912 Federal Equity Rules, and the 1938 Federal Rules of Civil Procedure. One odd development is a tension between the 1842 Rule XLVIII, which holds out that non-participants should not be bound by the outcome of a representative suit, and the rule declared in *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), where the Supreme Court decided to make a representative suit's decision binding on non-participants. Rather than amending Rule XLVIII immediately to conform in line with the rule in *Smith*, the Supreme Court maintained this tension for some sixty years. When Rule 38 of the 1912 Federal Equity Rules finally removed the provision contradicted by *Smith*, it took another Supreme Court case to clarify that Rule 38 not only removed a contradiction between text and practice but created a stronger consequence. All class suits, under Rule 38 forward, would be binding on class members who did not participate in the litigation.

Early Supreme Court Decisions on Equitable Representative Litigations

Two major questions stand out from reviewing the development of the procedural rules for representative litigations. First is what motivated the inclusion of the 1842 Rule XLVIII, allowing for only non-binding representative suits. Second is what motivated the removal of the final clause when the 1842 Rule XLVIII became Equity Rule 38. Supreme Court decisions can provide some insight into both questions. Before 1842, only two cases with Supreme Court justices approached the question of representatives, and both involved Justice Joseph Story. The first, *West v. Randall*,[1] was a circuit court case where Justice Story sat with Judge David Howell in Providence, Rhode Island. The second went before the entire Court in 1829 as *Beatty v. Kurtz*.[2]

In 1814, William West of Rhode Island passed away. One of his sons, also named William West but hailing from Massachusetts, sought his share of his father's estate as one of seven heirs. However, the property was held in trust in order to satisfy the elder West's debts.[3] The younger West filed suit in federal circuit court against the Rhode-Island-based trustees, ultimately unsuccessfully.[4] One of the issues raised was whether West should have joined the other heirs as plaintiffs to break the trust. Doing so, however, would have destroyed complete diversity.[5] Before deciding the case on other grounds, Justice Story's opinion briefly explored the possibility of West acting as representative on behalf of the heirs so that the rule of complete diversity, "founded on mere convenience and general fitness, [should not] defeat the purposes of justice."[6]

Justice Story noted that "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for

[1] 2 Mas. 181, 29 F. Cas. 718 (C.C.D.R.I. 1819).
[2] 27 U.S. (2 Pet.) 566 (1829).
[3] *West v. Randall*, 2 Mas. 181, 183, 186 (C.C.D.R.I. 1819). Incidentally, the elder West was a party in a Supreme Court case, *West v. Barnes*, 2 U.S. (2 Dall.) 401 (1791).
[4] *West*, 2 Mas. at 208.
[5] *West*, 2 Mas. at 197. The requirement of complete diversity was a consequence of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806). Recourse in the Rhode Island state courts was apparently not available because the equitable powers of the state courts were limited at the time. Indeed, possibly in response to this suit, the Rhode Island General Assembly granted state courts equitable jurisdiction over trusts created for the benefit of creditors. Amasa M. Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journal 148, 154 (1905).
[6] *West*, 2 Mas. at 195-196.

public or private purposes, and may be fairly supposed to represent the rights and interest of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree. Yet in these cases, so solicitous is the court to attain substantial justice, that it will permit the other parties to come in under the decree, and take the benefit of it, or to show it to be erroneous, and award a re-hearing; or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger of injury or injustice."[7] This rule, which cites treatises on English equity by George Cooper[8] and Henry Maddock[9] as well as *Cockburn v. Thompson*,[10] could plausibly be justified as a Chancery practice suitable for federal circuit court use through Rule XXXIII when the Court later promulgated the 1822 Rules. Interestingly, much of the *West* opinion became a footnote in the 1823 Supreme Court decision of *Wormley v. Wormley*,[11] where a wife seeking to break a trust did not name her husband as a defendant in order to keep complete diversity; in that case, the Court determined the omission was permissible.

The circumstances leading to *Beatty* also involved death. Before the American Revolution, Charles Beatty and George Frazier Hawkins developed an annex of Georgetown, then in Maryland, and set aside a piece of land "for the sole use and benefit of the German Lutheran Church."[12] A Lutheran congregation took use of the land to build a church and graveyard, but Beatty never transferred the land's title to the congregation. After Beatty's death, his son Charles A. Beatty inherited the plot and sold it to John T. Ritchie, who then sought to destroy the cemetery. The trustees of the church filed suit in federal circuit court for the District of Columbia to secure title to the land. The circuit court ruled in favor of the trustees, and the Supreme Court affirmed.[13]

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[7] *West*, 2 Mas. at 193.
[8] George Cooper, *A Treatise of Pleading on the Equity-Side of the High Court of Chancery* (London: A. Strahan, 1809), 39.
[9] Henry Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, Volume II (London: W. Clark and Sons, 1815), 144-145
[10] 16 Ves. 321 (Ch. 1809).
[11] 21 U.S. (8 Wheat.) 421, 451 n a (1823). It is not clear if Story consented to having the footnote, since the note itself suggests that the editor (presumably Henry Wheaton) was responsible for it.
[12] *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 566-567 (1829).
[13] *Beatty*, 27 U.S. (2 Pet.) at 585.

The defendants attacked the suit on several grounds. They denied the existence of any conveyance of land or, implausibly, a Lutheran congregation, and they pointed out the graveyard included non-Lutherans.[14] The defendants also asserted that, even if the congregation existed, the plaintiffs had no power to pursue the lawsuit. Justice Story's opinion dispensed with all of these arguments; the Lutherans took possession of the land more than a half-century ago and made good use of the land during the older Beatty's lifetime.[15] Story concluded that the congregation, while unincorporated, was organized enough to have clear leadership and the plaintiffs could act on its behalf because "we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all, and beneficial to all."[16]

Justice Story's recognition of representative litigations in the equitable practices of England facilitated the inclusion of Rule XLVIII in the 1842 promulgation of the revised Rules of Practice. However, he apparently soured on the idea of binding non-parties to the outcomes of litigations pursued by their representatives.[17] Rule XLVIII effectively eliminated the precedential value of *West* and *Beatty* by insisting that representative suits are not binding on non-litigants. Justice Story can be credited as the American jurist who planted the seeds of the future class action, but his immediate legacy was a weak rule that made representative suits near-useless.

The Supreme Court's next case involving representative suits was *Smith v. Swormstedt*, which exemplified national disunity over slavery and foreshadowed the divisions of the Civil War. In 1784, a group of preachers organized the Methodist Episcopal Church, and it quickly became the largest sect in America by the early nineteenth century. Early on, the ME Church established the Methodist Book Concern as a publishing house to raise money to support worn-out preachers and their families, and the denomination came to rely heavily on its lucrative profits. National success took a toll, however, as northern and southern Methodists disagreed on slavery. In 1844, southern leaders sought to disassociate from the denomination.

[14] *Beatty*, 27 U.S. (2 Pet.) at 568-569. Needless to say, even if the graveyard was for the benefit of the general public, it seems tasteless that Ritchie sought to destroy the monuments in the graveyard.
[15] *Beatty*, 27 U.S. (2 Pet.) at 581.
[16] *Beatty*, 27 U.S. (2 Pet.) at 583-584.
[17] SC Yeazell, *From Medieval Group Litigation to the Modern Class Action*, 218-219.

A two-part agreement was made among leaders of both sides that (1) allowed southern Methodists to disaffiliate with the ME Church and create their own communion but (2) required the consent of both northern and southern Methodists to partition the assets of the Book Concern. The southern Methodists proceeded to create the Methodist Episcopal Church, South, in accordance with the first part,[18] but the northern Methodists, who soured on the idea of separation, rejected partition of the Book Concern. In response, members of the southern church filed suit for an equitable division of the Book Concern's assets.

At least, that story is the one presented by Justice Samuel Nelson, who wrote the opinion in *Smith* and had joined the Court months before Justice Story's death in 1845. The northern Methodists presented their own counter-narrative of the split, asserting that the leaders had no authority under the ME Church's constitutional documents to propose any agreement for division. The southern Methodists who wanted to leave had every right to do so, but just like all past schismatics who knew to start from scratch after disaffiliation, they also lost their recourse to the Book Concern. Justice Nelson rejected this argument, concluding that when a large enough number of people disaffiliate from an organization, it is no longer appropriate to speak of them leaving behind the organization to those who stay but rather that the old collective has dissolved and in its place stand two successor organizations. By the very terms of the agreement, Nelson conceded that the Book Concern assets should only belong to the northern Methodists belonging to the ME Church, but he found that the principles of equity demanded a fair sharing of resources between the north and the south.

In order to reach this conclusion, Justice Nelson declared an equitable rule which, apparently unknowingly to Nelson, contradicted the last sentence of Rule XLVIII. "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and

[18] The territory of the Methodist Episcopal Church, South, included the states that later joined the Confederacy, except for western and northern Virginia, and Kentucky. The Methodist Episcopal Church had claim to the rest of the United States.

liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be property protected and maintained."[19] Oddly, Nelson was clearly familiar with Story's expertise on matters of equity because he cites Story's treatise on equity pleadings, yet no mention is ever made of Rule XLVIII.[20] There is one potential explanation for this situation; Nelson's judicial career before joining the Supreme Court was with the New York state courts, and he had no exposure to the practices of the federal circuit courts. He would not have had many opportunities to have learned of Rule XLVIII's existence.

The full background to the Methodist Schism of 1844 and the litigation leading to *Smith* provides better context for Nelson's decision. The organizers of the nascent MEC South commissioned some of themselves, including a preacher named William Smith, to handle the transfer of Book Concern assets from the ME Church. Smith and his fellow commissioners targeted for legal action the ME Church officials operating the Book Concern, including one named Leroy Swormstedt. However, the ME Church divided the functions of the Book Concern to two offices, one in New York and the other in Cincinnati. The southern commissioners thus filed separate equity suits with the federal circuit court in both cities. *Smith* began as the suit filed in the District of Ohio, where District Judge Humphrey Leavitt dismissed the bill, finding that, at best, the southern commissioners represented a new church that had no legal or equitable claim to the Book Concern's assets, which belonged to another church entirely.[21] In doing so, he reached the opposite conclusion of *Bascom v. Lane*,[22] the suit in the Southern District of New York where Justice Nelson happened to be the circuit justice. *Bascom* apparently came out months before Leavitt's decision in the *Smith* circuit court case, but curiously, neither circuit court case acknowledged the existence of the other litigation.

Justice Nelson reached the same conclusion regarding the fate of the Book Concern in both *Bascom* and the *Smith* appeal, but some differences exist in their analysis. *Bascom* framed the Book Concern as a charitable fund, with the southern commissioners representing the southern Methodist preachers in their

[19] *Smith*, 57 U.S. (16 How.) at 303.
[20] *Smith*, 57 U.S. (16 How.) at 302.
[21] *Smith v. Swormstedt*, 5 McLean 369, 22 F. Cas. 663, 682 (C.C.D. Ohio 1852).
[22] *Bascom v. Lane*, 2 F. Cas. 994 (C.C.S.D. New York 1851). Henry Bascom died during the litigation, and Smith took his place; George Lane was Swormstedt's counterpart in New York who was named first in this suit.

capacity as beneficiaries to the charitable fund who are seeking their equitable share of the fund.[23] The *Smith* appeal framed the dispute more openly as a church divorce, with the two remnants of the one former communion fighting over the same assets.[24] In order to accomplish this divorce, Nelson regarded the two denominations as unincorporated associations, with the commissioners representing the MEC South. In order to justify the splitting of the Book Concern assets in two, the legal interests of the non-party members of the MEC South needed to be enforceable, so Nelson concluded that every southern Methodist needed to be bound to his decision. In order to emphasize this point, Nelson not only explicitly reversed Judge Leavitt's decision but also directed specific next steps that must be taken in order to properly split the assets of the Methodist Book Concern.[25]

None of the three judicial decisions associated with the Methodist Book Concern mentions Rule XLVIII, *West*, or *Beatty*. The *Smith* appeal presented a live counterexample to Rule XLVIII, but the Supreme Court refused to acknowledge the textual conflict in the aftermath of *Smith*. The Court cited *Smith* favorably in a few decisions before the Civil War broke out,[26] but then it seemed to fall out of the Court's consciousness until the start of the twentieth century.[27] The most impactful citation may be in *Wallace v. Adams*,[28] where the Court justifies the preclusive effect of a prior legal proceeding based on the precedent of *Smith*. At the same time, the reach of *Smith* was also evident. In the postbellum *Coann v. Atlanta Cotton Factory Co.*,[29] the circuit court allowed several creditors to pursue their claim against an insolvent clothing factory despite an earlier foreclosure proceeding, reasoning that Rule XLVIII protected their interests because they were not parties in the earlier suit, even though that suit's plaintiffs claimed to represent the interests of all creditors; *Smith* is conspicuously absent in the court's discussion.

[23] *Bascom*, 2 F. Cas. at 998.
[24] *Smith*, 57 U.S. (16 How.) at 305-306.
[25] *Smith*, 57 U.S. (16 How.) at 312-313.
[26] *Bacon v. Robertson*, 59 U.S. (18 How.) 480, 489 (1856) (where *Smith* is used to justify a suit filed by a number of stockholders of an insolvent corporation to also act on behalf of other stockholders); *Ayres v. Carver*, 58 U.S. 591, 594 (1855) (where the Court acknowledges the existence of *Smith* but dismisses the appeal for lack of jurisdiction).
[27] *United States v. Old Settlers*, 148 U.S. 427 (1893), is the lone exception, which uses *Smith* to justify the existence of representative litigations in the Court of Claims, perhaps because Rule XLVIII applied only to the federal circuit courts.
[28] 204 U.S. 415 (1907).
[29] 14 F. 4 (C.C.N.D. Georgia 1882).

Some treatises acknowledged some sort of connection between Rule XLVIII and *Smith* but obliterated or obscured the latter's content.[30] In hindsight, it seems clear that *Smith* applied to representative suits involving groups and organizations that needed legal recognition as collective entities without undergoing incorporation, such as the southern Methodists in *Smith*, the former shareholders of an insolvent corporation such as in *Bacon v. Robertson*,[31] or the native Americans who had gained citizenship together through a previous lawsuit such as in *Wallace*; on the other hand, Rule XLVIII was cited when no such collective entity was involved. At the time when Rule XLVIII and *Smith* co-existed, however, this distinction was not clearly articulated. The Supreme Court never revised Rule XLVIII until the promulgation of the Federal Equity Rules in 1912. The revision into Equity Rule 38 eliminated the last sentence making representative suits non-binding on non-parties, but it was unclear if this change meant the Court was recognizing the *Smith*-related exceptions or if all representative suits under the revised rule would be binding on non-parties.

The Supreme Court addressed this ambiguity in 1921 with *Supreme Tribe of Ben-Hur v. Cauble*. The Supreme Tribe of Ben-Hur, an Indiana-based incorporated fraternal organization, offered its members elaborate rituals based on Lew Wallace's novel and life insurance.[32] Eventually, the leadership sought changes to membership policies so that members would need to pay higher rates to get the same death benefits.[33] In 1913, non-Indiana members filed a class suit against the Tribe of Ben-Hur in federal district court to roll back the change but lost.[34] In 1919, Amelia Cauble and other Indiana-based members filed suit in Indiana state court for the same purpose, but the society went to federal court to assert *res judicata*. Cauble argued that Indiana-based members were not represented in the original federal lawsuit because they would have otherwise destroyed complete diversity; the court agreed but certified the question for

[30] See *Rules of Federal Practice: Consisting of the Rules of the Supreme Court of the United States, and Orders of the Supreme Court in Reference to Appeals from the Court of Claims; the Rules Prescribed by the Supreme Court for the Circuit and District Courts of the United States in Equity and in Admiralty; together with the Rules of the Court of Claims*, edited by Edward K. Jones (New York: George S. Diossy, 1884), 107.
[31] 59 U.S. (18 How.) 480 (1856).
[32] *Court Degree Ritual of the Tribe of Ben-Hur: Containing the Opening and Closing Ceremonies, Amplified Form of Initiation, Court Degree and the Installation Ceremonies* (D.W. Gerard, 1897).
[33] *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 358-359 (1921).
[34] *Supreme Tribe of Ben-Hur*, 255 U.S. at 361.

appeal to the Supreme Court.[35] In an opinion by Justice William R. Day, the Supreme Court reversed, finding that Cauble's interests coincided with those who pursued the original lawsuit, so her interests were already represented by the non-Indiana plaintiffs and therefore she was bound by the suit's dismissal.[36] Furthermore, while complete diversity was required to initially file the original lawsuit, the Indiana members could have intervened later without kicking the case out of federal court.[37] Finally, the Court concluded that the revision to Equity Rule 38 repudiated Rule XLVIII completely; under the new rule, court decisions "when rendered must bind all of the class properly represented,"[38] ushering in the binding class suit as the default and only option for federal representative litigations.

The Supreme Court decided *Smith* and *Supreme Tribe of Ben-Hur* during the near-century where the Court held out the existence of a federal general common law, and indeed the two cases themselves roughly bookend the start and close of the *Swift* era. The intuition for *Swift* was the hope that state supreme courts would adopt the Supreme Court's findings of general common law in order to eliminate local differences and help usher in a uniform common law across the nation.[39] Thus, it is all the more striking that, for most of the *Swift* era, the Supreme Court was unable or unwilling to explicitly harmonize the inconsistency between *Smith* and Rule XLVIII.

[35] *Supreme Tribe of Ben-Hur*, 255 U.S. at 362-363.
[36] *Supreme Tribe of Ben-Hur*, 255 U.S. at 366-367.
[37] *Supreme Tribe of Ben-Hur*, 255 U.S. at 366.
[38] *Supreme Tribe of Ben-Hur*, 255 U.S. at 367.
[39] *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842).